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IN THE

# Supreme Court of the United States

AVERILL PARK CENTRAL SCHOOL DISTRICT,
AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD
OF EDUCATION, and AVERILL PARK HIGH SCHOOL,

*Petitioners*,

*v.*

LOUIS J. CIOFFI, III,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

On April 4, 2006, the United States Court of Appeals for the Second Circuit reversed the District Court's decision that the Averill Park Central School District had not violated the First Amendment rights of its former Athletic Director Louis Cioffi, and remanded Cioffi's First Amendment claim for jury trial. In so doing, the Second Circuit concluded that Cioffi's speech touched on matters of public concern and was accordingly protected under the First Amendment. Eight weeks later, on May 30, 2006, this Court decided *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), holding that the First Amendment does not protect statements made by public employees pursuant to their professional duties. The Second Circuit, in attempting to anticipate this Court's then-pending decision, incorrectly assumed that a public employee's speech would remain protected, even when made within the scope of his or her official duties, so long as it touched on a matter of public concern. This Court's decision in *Garcetti* calls into question the decision of the Second Circuit, and necessitates this petition for review on the following questions:

1. Whether the United States Court of Appeals for the Second Circuit has extended First Amendment protection to any speech by a public employee which touches on a matter of public concern, without due regard for whether the employee spoke within the scope of his official duties, and inconsistent with this Court's recent decision in *Garcetti v. Ceballos*?

2. Whether this Court's review is necessary for the limited purpose of vacating the decision and judgment below and remanding to the Second Circuit for further consideration in light of *Garcetti*, to prevent a conflict between the Second Circuit's decision and that of this Court regarding the scope of a public employee's First Amendment free speech rights?

3. What is the proper analytical framework for defining the scope of a public employee's official duties, for purposes of a First Amendment claim?

## LIST OF PARTIES

The parties to this action in the courts below are listed in the caption, with the exception of the individual Defendants-Appellees, Mr. Thomas P. McGreevy and Dr. Michael J. Johnson, against whom all claims have been dismissed.

## CORPORATE DISCLOSURE STATEMENT

The Averill Park Central School District is a municipal corporation. The Averill Park Central School District Board of Education is the governing body of the Averill Park Central School District. Averill Park High School is a public school facility operated by the Averill Park Central School District.

## TABLE OF CONTENTS

*Page*

Questions Presented .......................... i

List of Parties .............................. iii

Corporate Disclosure Statement ............... iii

Table of Contents ............................ iv

Table of Cited Authorities ................... vii

Table of Appendices .......................... ix

Opinions Below ............................... 1

Statement of Jurisdiction .................... 1

Constitutional and Statutory Provisions Involved .. 1

Statement of the Case ........................ 2

- A. Basis for Federal Jurisdiction in the Court of First Instance ........................ 2
- B. Factual Background ....................... 3
- C. Procedural History ....................... 4

## *Contents*

*Page*

Reasons for Granting the Petition .............. 5

I. The Second Circuit Has Swept All Speech by a Public Employee on any Matter of Public Concern, Including Speech Within the Scope of an Employee's Official Duties, Under the Mantle of the First Amendment. .......... 6

A. *Garcetti* Excludes Speech Made Pursuant to a Public Employee's Official Duties from First Amendment Protection. .... 6

B. The Second Circuit Erred When It Noted that Speech is Not Made "Strictly" Pursuant to a Public Employee's Official Duties if it Touches on a Matter of Public Concern. ....................... 9

II. The Second Circuit's Equation of "Citizen" Speech with Speech on a Matter of Public Concern is in Direct Conflict with this Court's Recent Limitation on the Scope of a Public Employee's Free Speech Rights. .......... 13

A. This Case Requires Thorough Analysis of the Scope of a Public Employee's Official Duties, for Purposes of a First Amendment Claim. ................ 14

*Contents*

*Page*

B. This Case Should be Remanded to the Second Circuit for Further Consideration in Light of *Garcetti*, to Prevent a Conflict with this Court's Decision. .......... 20

Conclusion ................................ 23

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Burkybile v. Board of Educ., Hastings-on-Hudson Union Free School Dist.*, 411 F.3d 306 (2d Cir. 2005) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10, 12

*Cioffi v. Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006) . . . . *passim*

*Cobb v. Pozzi*, 363 F.3d 89 (2d Cir. 2004) . . . . . . . . 9

*Connick v. Myers*, 461 U.S. 138 (1988) . . . . . . . . 7, 8, 19

*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) . . . . . *passim*

*Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979) . . . . . . . . . . . . . . . . . . . . . . . . . 8

*Mandell v. County of Suffolk*, 316 F.3d 368 (2d Cir. 2003) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

*Meacham v. Knolls Atomic Power Laboratory ("KAPL")*, 381 F.3d 56 (2d Cir. 2004), *cert. granted*, 544 U.S. 957 (2005) . . . . . . . . . . . . . 20, 21

*Morris v. Lindau*, 196 F.3d 102 (2d Cir. 1999) . . . . 9

*Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563 (1968) . . . . . . . . . . . . . . . . . . 7, 8

*Smith v. City of Jackson*, 544 U.S. 228 (2005) . . . . . 21

*Page*

**Constitutional Provisions:**

U.S. Const. amend. I . . . . . . . . . . . . . . . . . . . . . . . . *passim*

**Statutes:**

28 U.S.C. § 1254(1) . . . . . . . . . . . . . . . . . . . . . . . . 1

28 U.S.C. § 1331 . . . . . . . . . . . . . . . . . . . . . . . . . . 2

29 U.S.C. § 621 . . . . . . . . . . . . . . . . . . . . . . . . . . 20, 21

42 U.S.C. § 1983 . . . . . . . . . . . . . . . . . . . . . . . . . . 2, 9

## TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Decided April 4, 2006 . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1a

Appendix B — Memorandum Decision And Order Of The United States District Court For The Northern District Of New York Dated September 30, 2004 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23a

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Cioffi v. Averill Park Central School District Board of Education*, 444 F.3d 158 (2d Cir. 2006). The Second Circuit affirmed in part and vacated and remanded in part the September 30, 2004 decision of the United States District Court for the Northern District of New York, which is not reported. *See* Appendices A-B.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on April 4, 2006. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Constitution of the United States, Amendment I:**

**Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.**

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

**Title 42 United States Code, Section 1983:**

**Civil Action for deprivation of rights.**

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

### A. Basis for Federal Jurisdiction in the Court of First Instance

The United States District Court for the Northern District of New York, (the "District Court") pursuant to 28 U.S.C. § 1331, exercised subject matter jurisdiction over Plaintiff Louis Cioffi's claims arising under 42 U.S.C. § 1983. Cioffi contended that his position of employment was abolished in violation of his First Amendment free speech rights, and thus presented a federal question.

## B. Factual Background

Cioffi was the Athletic Director for the Defendant Averill Park Central School District ("Averill Park"). Cioffi supervised Kevin Earl, the head football coach, as part of his overall responsibility for Averill Park's interscholastic athletic teams. Cioffi was a frequent critic of Earl, with whom he had an acrimonious relationship. (App. B at 24a-26a; App. A at 3a, 17a.)

In early October 2001, a parent complained about misbehavior in the football team locker room. Cioffi and another administrator were assigned to investigate. On October 12, 2001, they learned that a football player had been subjected to an incident of hazing. (App. B at 26a; App. A at 3a-4a, 17a.) Under the direction of Dr. Michael Johnson, the Superintendent of Schools, a team of administrators, including Cioffi, subsequently ordered increased locker room supervision by the coaches. They also conducted anti-hazing training for coaches and students, with the assistance of the New York State Police. (App. A at 3a-4a.)

On November 7, 2001, Cioffi sent a letter to Dr. Johnson in response to an inquiry concerning administrative or "leadership" responsibility for the hazing incident. In that letter, Cioffi reiterated his prior complaints about Earl. Cioffi professed that an "overriding concern" for the "health and safety" of student athletes had prompted him to report Earl's alleged infractions. In that letter, Cioffi disclaimed any personal responsibility for the hazing incident. He also questioned the adequacy of the administration's response to that incident. (App. B at 26a; App. A at 4a.)

On January 22, 2002, the Averill Park Board of Education informally agreed to eliminate the Athletic Director position from the school district budget for the following school year. Cioffi learned of this plan, and on January 31, 2002, held a press conference in which he protested the Board's decision, and publicly reiterated his complaints about Earl and his alleged concerns regarding the administration's response to the hazing incident. On February 26, 2002, the Board formally abolished Cioffi's position. (App. B at 27a; App. A at 4a-5a.) Cioffi subsequently commenced this action against Averill Park, Dr. Johnson, and Mr. Thomas McGreevy, President of the Board of Education.

## C. Procedural History

The District Court granted Defendants' motion for summary judgment, and dismissed Cioffi's First Amendment claim (as well as all of his other claims). The District Court concluded that neither the November 7, 2001 letter nor the press conference constituted speech protected under the First Amendment. In the view of the District Court, the November 7, 2001 letter "was an attempt by Plaintiff to avoid personal responsibility for the hazing incident," and the press conference was Cioffi's "last-ditch effort" to save his job. Both the letter and the press conference were thus "an employment matter." (App. B at 29a.) Cioffi appealed.

On April 4, 2006, the Second Circuit reversed and reinstated Cioffi's First Amendment claim for jury trial. In so doing, the Second Circuit focused on whether Cioffi's letter and press conference touched on matters of public concern. (App. A at 7a-13a.) The Second Circuit expressed no doubt that Cioffi's at-issue speech was motivated "partly to protect his job and shift blame [for the hazing incident] to other administrators." (App. A at 15a.) The Second Circuit nevertheless concluded that both the November 7, 2001 letter and the press conference warranted First Amendment protection because they touched on matters of public concern. (App. A at 7a-13a.)

The Second Circuit affirmed that portion of the District Court's decision which dismissed Cioffi's claims against the individual Defendants. (App. A at 8a-9a.) Only the municipal Defendants remain in this action.

This Court's decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), was handed down on May 30, 2006, after Averill Park's time to seek reconsideration or rehearing by the Second Circuit *en banc* had elapsed.

## REASONS FOR GRANTING THE PETITION

This Court's recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), established that when a public employee's statements are made pursuant to his official duties, he is not speaking as a "citizen" for purposes of First Amendment protection. This Court held that even if the employee's speech touches on a "matter of public concern," the employee may be subject to adverse action based on such communications. *Id.* at 1959-61. The rule of law articulated by this Court does not permit a public employee's work product to be deemed the speech of a "citizen-employee," regardless of the public interest in that work product.

The Second Circuit, in its April 4, 2006 decision, extended First Amendment protection to Cioffi's speech, simply because it touched on a matter of public concern, and without due consideration of whether Cioffi spoke pursuant to his official duties as Athletic Director. (App. A at 7a-13a.) In an effort to anticipate this Court's then-pending decision in *Garcetti*, the Second Circuit erroneously assumed that Cioffi's speech could be dually considered that of a citizen-employee, even if made within the scope of his official duties. (App. A at 16a-17a n.3.) This assessment is in conflict with this Court's decision in *Garcetti*, and may lead the trial courts to erroneous rulings in this case and many other cases. Certiorari should be granted at least to the extent of vacating the decision and judgment below, and remanding to the Second Circuit for further consideration in light of *Garcetti*.

## I. The Second Circuit Has Swept All Speech by a Public Employee on any Matter of Public Concern, Including Speech Within the Scope of an Employee's Official Duties, Under the Mantle of the First Amendment.

### A. *Garcetti* Excludes Speech Made Pursuant to a Public Employee's Official Duties from First Amendment Protection.

This Court recently held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006). The plaintiff in *Garcetti* was a deputy district attorney whose First Amendment claim arose out of a "disposition memorandum," in which plaintiff recommended to his supervisors that a pending criminal case should be dismissed because of misrepresentations in an affidavit used to obtain a search warrant. *Id.* at 1955-66. The "controlling factor," for purposes of this Court's analysis, was that plaintiff "spoke as a prosecutor fulfilling a responsibility to advise his supervisor how to best proceed with a pending case." *Id.* at 1959-60.

With the possible exception of free speech claims arising out of "academic scholarship or classroom instruction,"[1] (*id.* at 1962) this Court has now established a bright-line exclusion of a public employee's "work product" from the ambit of First Amendment protection. *Id.* at 1960. When a public employee speaks or writes within the scope of his or her official employment responsibilities, his or her speech may no longer be shielded by the First Amendment from consequential adverse employment action. Supervisors have a right to "ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Id.* If a supervisor believes that such communications are "inflammatory or misguided," adverse employment action may ensue. *Id.* at 1960-61. Put simply, a public employer pays for its employees' work product, and under *Garcetti*, has the right to control the content of such work product, without fear of a free speech retaliation claim.

The foundations of this Court's decision in *Garcetti* lie in *Connick v. Myers*, 461 U.S. 138 (1988), and *Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563 (1968), which instruct that only a public employee's speech "as a citizen upon matters of public concern" warrants First Amendment protection. *Connick*, 461 U.S. at 146-47; *Pickering*, 391 U.S. at 568. *Garcetti*, however, has sharply limited the reach of *Connick* and *Pickering* by clarifying that a public employee cannot be commenting "as a citizen" upon a matter of public concern when "the employee is simply performing his or her job duties." 126 S. Ct. at 1961.

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[1] Although this case arises in a public school setting, it raises no issue related to academic freedom. Cioffi had no responsibility for classroom instruction at the time of the pertinent events, and his speech did not concern academic scholarship or teaching.

As an illustrative example, a public school teacher remains protected under the First Amendment when complaining to the principal about alleged race discrimination in a school district's employment practices, because her job involves classroom instruction, and does not include responsibility for the school district's employment practices. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413-16 (1979). The effect of *Garcetti*, however, is that if the school district's "personnel officer" made a similar complaint to his supervisors, his complaint would not be protected under the First Amendment, because the school district's employment practices fall within the scope of his official duties. *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting).

*Garcetti* thus teaches that a public employee may not wear his or her "official duties" hat and "citizen" hat simultaneously. This is a logical corollary of the demarcation drawn by this Court between "speech that owes its existence to a public employee's professional responsibilities," which can no longer be sheltered under the First Amendment, and a public employee's speech as a citizen, which remains protected, even when carried out in the workplace. *Id.* at 1960. This distinction recognizes that the right of public employees to make "contributions to the civic discourse . . . does not invest them with a right to perform their jobs however they see fit." *Id.* Public employers now have some latitude to control and supervise "speech made by an employee in his or her professional capacity" (*id.*) without giving rise to a retaliation claim under the First Amendment.

In sum, this Court has now instructed that it is not sufficient, for First Amendment protection, that a public employee's speech merely touches on a matter of public concern. To warrant protection, such speech must have been made as a citizen, while the employee was acting outside the scope of his or her employment. *Id.* at 1959-61. Under *Garcetti*, a public employer may no longer be required to defend at trial a First Amendment claim predicated solely upon a finding by a court that a public employee's speech touched on a matter of public concern.

### B. The Second Circuit Erred When It Noted that Speech is Not Made "Strictly" Pursuant to a Public Employee's Official Duties if it Touches on a Matter of Public Concern.

The Second Circuit overstated the scope of a public employee's First Amendment rights with its generalization that "the rights of an individual like Cioffi to speak out on matters of public concern are enshrined in the First Amendment to the Constitution." (App. A at 7a.) Under the rule adhered to by the Second Circuit in this case and earlier cases, a public employee's speech is protected if it addresses any matter of public concern, without due regard to whether the employee spoke as a citizen, or as an employee in carrying out his or her official duties. To establish a First Amendment claim of retaliation under 42 U.S.C. § 1983, therefore, Cioffi and other public employees have merely been required to show that: (1) his or her speech addressed a matter of public concern; (2) he or she suffered an adverse employment decision; and (3) a causal connection between these two events. (App. A at 7a.) *See, e.g., Cobb v. Pozzi*, 363 F.3d 89, 102 (2d Cir. 2004); *Mandell v. County of Suffolk*, 316 F.3d 368, 382 (2d Cir. 2003); *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999).

In applying this analysis, the Second Circuit has extended First Amendment protection to any "public accusations of improper governmental actions . . . regardless of whether the accuser is motivated by personal reasons." *Burkybile v. Board of Educ., Hastings-on-Hudson Union Free School Dist.*, 411 F.3d 306, 313 (2d Cir. 2005). The Second Circuit did so again in this case.

The Second Circuit held that Cioffi's November 7, 2001 letter, as well as his press conference, constituted protected speech under the First Amendment. In so doing, the Second Circuit focused on whether Cioffi's speech touched on matters of public concern. (App. A at 10a-11a.) The Second Circuit concluded that, notwithstanding Cioffi's self-serving interests in protecting his job and shifting blame for the hazing incident to other administrators, the "issues of oversight of Earl and the football program and the school district's handling of the hazing investigation" were matters of public concern. (App. A at 11a-12a, 15a-16a.) As discussed below, "oversight of Earl and the football program," as well as any student health or safety concerns allegedly raised by the "school district's handling of the hazing investigation," were squarely within the ambit of Cioffi's official duties.

As this Court concluded in *Garcetti*, although "exposing governmental inefficiency and misconduct is a matter of considerable significance," doing so is no longer automatically shielded under the First Amendment. If the employee's accusations are made "in the course of doing his or her job," the First Amendment does not prohibit the employer from taking disciplinary action. 126 S. Ct. at 1962. Under *Garcetti*, to the extent that Cioffi's accusations about Averill Park's allegedly "out-of-control" football program and the alleged inadequacies of the School District's response to the hazing incident were made in the course of doing his job, First Amendment protection does not attach to these accusations.

The Second Circuit did not separately analyze in detail whether Cioffi's November 7, 2001 letter and his press conference were within the scope of his official duties as Athletic Director. The Second Circuit was not required to undertake this analysis at the time of its April 4, 2006 decision, as this Court's decision in *Garcetti* had not yet been handed down. The Second Circuit, however, muddied the landscape when it attempted to anticipate the outcome of this Court's then-pending decision, and applied a legal standard that is clearly erroneous under *Garcetti*.

Specifically, the Second Circuit misstated the "official duties" inquiry in a footnote, when it observed that Cioffi's "speech was not made strictly pursuant to his duties as a public employee," due to Cioffi's professed concern for "the health and safety of the students involved," in connection with his statements about the hazing incident and the School District's response to that incident. (App. A at 16a-17a n.3.) In so doing, the Second Circuit did not distinguish between Cioffi's November 7, 2001 letter, which was an internal communication to his supervisors, and his subsequent press conference.

Without the benefit of this Court's instruction in *Garcetti*, and without waiting for the new rule of law established in that case, the Second Circuit collapsed two inquiries which now require separate and distinct analysis. *Garcetti* teaches that not all statements by a public employee which touch on a matter of public concern are automatically sheltered under the First Amendment. The courts must separately consider whether the statements were made within the scope of the employee's official job duties. If so, First Amendment protection does not attach. 126 S. Ct. at 1959-60. The Second Circuit, however, appears to have assumed that Cioffi was simultaneously speaking as a citizen, while carrying out his official duties, *solely because* his speech touched on matters of public concern. (App. A at 16a-17a n.3.)

Under *Garcetti*, this conclusion, which fails to account for the sharp distinction between speech as a citizen and speech within the scope of an employee's official duties, may no longer stand. The Second Circuit's misinterpretation of the "official duties" exclusion from the reach of the First Amendment departs so dramatically from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The trial courts within the circuit would benefit from clarification and correction of the Second Circuit's premature exposition of its views on when a public employee is speaking as a citizen. This Court's limited intervention is required to direct the Second Circuit to revisit this issue, in light of *Garcetti*.

The need for prompt and thorough consideration by the Second Circuit of how to draw the line between "citizen" speech and speech pursuant to an employee's official duties is particularly critical, due to the Second Circuit's willingness to disregard an employee's self-serving purposes embedded within his or her speech. (App. A at 15a-16a.) *See Burkybile*, 411 F.3d at 313. If the Second Circuit's equation of "citizen" speech with speech on a matter of public concern is allowed to stand, school districts and other public employers may continue to be forced to defend First Amendment claims arising out of an employee's official communications in which the employee seeks to advance his or her own personal employment interests, so long as those communications also touch on matters of public concern. Such a result would be contrary to this Court's recent clarification that the right of public employees to comment on a subject of public concern does not invest employees with the right to do their jobs however they please. 126 S. Ct. at 1960.

## II. The Second Circuit's Equation of "Citizen" Speech with Speech on a Matter of Public Concern is in Direct Conflict with this Court's Recent Limitation on the Scope of a Public Employee's Free Speech Rights.

This case presents the next question, left unanswered in *Garcetti* — what is the proper "framework for defining the scope of an employee's duties" in a First Amendment free speech case when there may be "room for serious debate" about the scope of those duties? 126 S. Ct. at 1961. This Court is now presented with an early opportunity to provide guidance to the lower courts by establishing the proper analytical framework for defining the scope of a public employee's official duties for purposes of a free speech claim. This Court may wish to grant certiorari to address this important question of federal law. The lower courts would greatly benefit from such guidance by this Court, as they begin to apply the "official duties" exception in cases involving First Amendment free speech retaliation claims.

Assuming, however, that this Court would prefer to first permit the lower courts to develop this analytical framework, then this Court should grant certiorari for the limited purpose of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for a determination, consistent with *Garcetti*, as to whether Cioffi's November

7, 2001 letter and his press conference were within the scope of his official duties as Athletic Director. Remand and further consideration by the Second Circuit is necessary to prevent a conflict between the Second Circuit's decision and that of this Court regarding the "official duties" exclusion from the ambit of constitutionally protected speech.

### A. This Case Requires Thorough Analysis of the Scope of a Public Employee's Official Duties, for Purposes of a First Amendment Claim.

To the extent that the Second Circuit found that Cioffi's speech in the November 7, 2001 letter and his press conference touched on matters of public concern, (App. A at 10a-13a) such matters were within the scope of Cioffi's job responsibilities as Athletic Director. The Second Circuit should thus be required to reconsider its decision, in light of *Garcetti*, and to separately determine whether Cioffi's November 7, 2001 letter and his subsequent press conference were functions of Cioffi's official duties, as opposed to the kind of activity engaged in by citizens who do not work for the School District. *See* 126 S. Ct. at 1961.

At least with respect to the November 7, 2001 letter, the "controlling factor" in this case may be the same as it was in *Garcetti*. As discussed below, Cioffi wrote that letter in his capacity as Athletic Director to fulfill a responsibility to advise his supervisors about a matter within the scope of his official duties. That letter should accordingly no longer be protected under the First Amendment. *See Garcetti*, 126 S. Ct. at 1959-60 (concluding that the "controlling factor," which was fatal to plaintiff's First Amendment claim, was that plaintiff "spoke as a prosecutor fulfilling a responsibility to advise his supervisor how to best proceed with a pending case").

The factual findings of the Second Circuit support a conclusion that Cioffi's November 7, 2001 letter to Dr. Johnson was within the scope of Cioffi's professional duties for First Amendment purposes. As Athletic Director, Cioffi "supervised the school district's athletic programs." (App. A at 17a.) The Second Circuit acknowledged that "Cioffi supervised Kevin Earl, the football coach," in his official capacity as Athletic Director. (App. A at 3a.) Cioffi was one of two administrators whose joint interviews of student-athletes revealed that a hazing incident had occurred. (App. A at 3a, 17a.) Cioffi, together with other members of an administrative team directed by Dr. Johnson, was involved in a number of corrective actions taken by the School District in response to that incident. (App. A at 3a-4a.)

It is undisputed that in all of Cioffi's prior complaints to Dr. Johnson and the Board of Education about the allegedly improper "activities, policies and practices" of Earl and the football program, Cioffi "was acting in his official capacity as Athletic Director with a concern for the health and safety of students." (R. 36.) The Second Circuit concluded that Cioffi's November 7, 2001 letter included a reiteration of those complaints. (App. A at 12a.) Cioffi stated in that letter that it was his "duty," which he took "quite seriously," to report his complaints about Earl to Dr. Johnson and the Board. (R. 228-29.)

The Second Circuit found that Cioffi's November 1, 2001 letter addressed "the [hazing] incident itself, the deficiencies in adult supervision that allowed it to occur, and possible insufficiencies of the school's response," all of which the court concluded were matters of public concern. (App. A at 10a.) Cioffi has acknowledged that in addressing these matters, he was "doing [his] job" because "health and safety, liability, professional misjudgment are all things that an Athletic Director must bring to his superiors." (R. 350.)

In sum, just as Mr. Ceballos was fulfilling his role as a prosecutor when he prepared a disposition memo to advise his supervisors that a pending criminal case should be dismissed because a search warrant was improperly obtained, (126 S. Ct. at 1959-60) Cioffi was fulfilling his role as Athletic Director in advising Dr. Johnson and the Board about his complaints concerning Earl and the football program, and the welfare of student-athletes in the aftermath of the hazing incident. (App. A at 4a, 12a.) Consistent with *Garcetti*, the November 7, 2001 letter may no longer be considered protected speech.

At first glance, Cioffi's public press conference presents a closer question than his November 7, 2001 letter, which was an internal communication to his supervisors. Notably, however, Cioffi's job responsibilities as Athletic Director included acting as press spokesperson for Averill Park's athletic programs. (R. 117, 306, 308.) The Second Circuit identified the same issues of public concern in both the press conference and the November 7, 2001 letter. (App. A at 10a-12a.) According to the Second Circuit, Cioffi's press conference "address[ed]" again and in detail these same issues of oversight of Earl and football program and the School District's handling of the hazing investigation." (App. at 12a.) As discussed above, these matters were within the scope of Cioffi's official duties. There may thus be "room for serious debate" as to whether the press conference was also within the scope of Cioffi's professional responsibilities.

Of significance to the Second Circuit's analysis on the "matter of public concern" inquiry was Cioffi's professed "overriding concern for the health and safety" of student-athletes, as expressed in both Cioffi's November 7, 2001 letter and his press conference. (App. A at 4a-5a, 15a-16a.)

It was, however, an integral part of Cioffi's job to have an "overriding concern" for the health and safety of student-athletes. (App. A at 4a-5a.) Cioffi testified that he was "hired to make sure that we are providing our student athletes with a safe atmosphere." (R. 311.)

In the courts below, Averill Park argued that Cioffi was misusing his position as Athletic Director, in connection with both the November 7, 2001 letter and the press conference, primarily to advance his personal employment interests. The District Court agreed. The District Court concluded that Cioffi's November 7, 2001 letter "was an attempt by Plaintiff to avoid personal responsibility for the hazing incident . . . since as Athletic Director Plaintiff would seemingly be responsible for the action or inaction of athletic coaches under whose watch the hazing incident occurred." (App. B at 29a.) The District Court similarly found that in the January 31, 2002 press conference, "Plaintiff was attempting to save his job, defend his personal reputation, blame the administration for the hazing incident and complain about his treatment at work." (App. B at 26a.) Neither these conclusions, nor Averill Park's arguments in support of these conclusions, are inconsistent with a finding that the November 7, 2001 letter and the press conference were within the scope of Cioffi's job responsibilities as Athletic Director.

As this Court observed in *Garcetti*, a public employer may deem "speech made by an employee in his or her professional capacity" to be "inflammatory or misguided," or otherwise contrary to the employer's interests. 126 S. Ct. at 1960-61. Such was the case with respect to the "disposition memo" prepared by plaintiff in that case, which led to a "heated meeting" between plaintiff, his supervisors in the prosecutor's office, and members of the local sheriff's department. *Id.* at 1956, 1960.

Similarly, in this case, Averill Park's Superintendent of Schools and Board of Education President have acknowledged their anger over Cioffi's November 7, 2001 letter, to the extent that he was attempting to avoid any share of blame for the hazing incident. (App. B at 26a; R. 102, 181.) Neither their reaction, nor Averill Park's arguments that Cioffi was misusing his position as a bully pulpit in furtherance of his personal agenda, suggests that Cioffi was not acting in his professional capacity with respect to the November 7, 2001 letter and the press conference.

In *Garcetti*, this Court left the page blank on the question of how to draw a line between speech as a citizen, and speech within the scope of a public employee's duties. This Court did so with the expectation that the lower courts would develop a comprehensive analytical framework for resolving this issue. 126 S. Ct. at 1961. Surely, the Second Circuit's footnote, which suggests that such a line need not be drawn at all, and that any speech which touches on a matter of public concern could be dually considered that of a citizen-employee, (App. A at 16a-17a n.3) is not the result intended by this Court.

This case presents a critical opportunity for development of the comprehensive analytical framework envisioned by this Court in *Garcetti*. Both the majority and the dissenting opinions in *Garcetti* expressed concern that public employers should not be permitted to restrict employees' free speech rights "by creating excessively broad job descriptions." 126 S. Ct. at 1961; *see id.* at 1965 n.2 (Souter, J., dissenting). This case, however, may be decided upon the unchallenged factual findings of the Second Circuit regarding Cioffi's job responsibilities, Cioffi's own prior statements about the scope of his official duties, and other record evidence developed before either side could have foreseen the impact of the *Garcetti* decision on this case. Cioffi's job description, for example, was prepared in 1999, (R. 115-118) and thus could not have been tailored by Averill Park with a view towards stifling Cioffi's free speech rights.

The Second Circuit should therefore be required to separately analyze, with the illumination of this Court's teaching in *Garcetti*, whether Cioffi's November 7, 2001 letter and his press conference were within the scope of Cioffi's official duties as Athletic Director. The result of any proper application of the rule of law announced in *Garcetti* to the established facts of this case will likely be a finding that the November 7, 2001 letter was squarely within the scope of Cioffi's professional responsibilities. Averill Park would thus not be required to defend Cioffi's retaliation claim at trial, to the extent that such claim arises out of his November 7, 2001 letter, consistent with this Court's intention that a public employer need not face liability under the First Amendment for statements made by a public employee in the course of doing his or her job. 126 S. Ct. at 1962. Even if questions of fact as to whether Cioffi's press conference also fell within the scope of his official duties necessitate trial on Cioffi's retaliation claim, to the extent that such claim arises out of the press conference, the Second Circuit would have an opportunity to develop a proper analytical framework for resolution of this issue at trial.[2] This

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[2] The question of whether a public employee's speech touches on a matter of public concern has always been a pure question of law to be resolved by the courts. *E.g.*, *Connick v. Meyers*, 461 U.S. 138, 148 n.7 (1983). This well established rule is unchanged by *Garcetti*. Averill Park acknowledges that it is bound by the Second Circuit's holding that Cioffi's November 7, 2001 letter and press

(Cont'd)

Court's limited intervention is required to remand this case to the Second Circuit for this purpose.

### B. This Case Should be Remanded to the Second Circuit for Further Consideration in Light of *Garcetti*, to Prevent a Conflict with this Court's Decision.

This Court has not hesitated to grant certiorari, to the limited extent of vacating and remanding a circuit court decision, when an intervening decision of this Court has resolved an important question of federal law in a manner which calls into question the circuit court's decision. For example, in *Meacham v. Knolls Atomic Power Laboratory ("KAPL")*, 381 F.3d 56 (2d Cir. 2004), *cert. granted*, 544 U.S. 957 (2005), the Second Circuit affirmed a jury verdict in favor of plaintiffs on their disparate impact age discrimination claims arising out of a reduction in force ("RIF"). 381 F.3d at 62, 79. The Second Circuit had long held that disparate impact claims were cognizable under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA") and did so again in *Meacham*. 381 F.3d at 70. The Second Circuit then permitted the jury verdict against KAPL to stand, essentially because subjective criteria used

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(Cont'd)

conference addressed matters of public concern, and that this holding could not be challenged on remand. (App. A at 10a.) Under *Garcetti*, however, this is no longer the end of the inquiry. Before such speech may be protected under the First Amendment, there must now be a separate determination that such speech was not within the scope of the employee's official duties. 126 S. Ct. 1960-62. This determination is presumably one of fact, not law, and may require the trial court to carefully craft jury instructions to guide such a determination when the issue cannot be resolved at summary judgment.

to select employees for the RIF had resulted in a statistically imbalanced number of older workers being laid off. *Id.* at 77.

KAPL petitioned for certiorari while this Court was considering similar issues in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In *Smith*, this Court resolved a conflict among the circuit courts by holding that disparate impact claims are cognizable under the ADEA. *Id.* at 239. This Court, however, imposed a more stringent burden of proof upon plaintiffs who pursue disparate impact claims under the ADEA, by excluding proof of disparate impact which is in reality the result of "reasonable factors other than age." *Id.* at 241.

This Court subsequently granted certiorari in the *Meacham* case, vacated the judgment of the Second Circuit, and "remanded for further consideration in light of *Smith*." 544 U.S. 957 (2005). Although this Court did not articulate the basis for its summary disposition, remand was apparently required for the Second Circuit to re-visit whether the jury verdict against KAPL could continue to stand under the *Smith* framework for analyzing ADEA disparate impact claims.

This Court should take a similarly limited course of action in this case, and vacate and remand the Second Circuit's decision for further consideration in light of *Garcetti*. Otherwise, the Second Circuit's premature observation that Cioffi was not speaking "strictly" pursuant to his official duties because his speech was related to a matter of public concern (App. A at 16a-17a, n.3) may sow the seeds of unnecessary confusion and conflict both for the trial court in this case, and for other courts within the Second Circuit.

Without the benefit of this Court's opinion in *Garcetti*, the Second Circuit appears to have assumed that a public employee may simultaneously speak with two voices — that of a citizen and that of an employee doing his or her job — for purposes of a free speech claim. The Second Circuit appears to have further assumed that an employee speaks with both voices, and remains protected under the First Amendment, whenever his or her speech touches on a matter of public concern. (App. A at 16a-17a n.3.) These conclusions are fundamentally at odds with *Garcetti*. Although the Second Circuit was not required to reach the issue of whether Cioffi's speech was within the scope of his official duties, at the time of its April 4, 2006 decision, it erred in attempting to foreclose any such analysis by observing, in a footnote, that Cioffi was not speaking "strictly" within his official duties because Cioffi professed a concern for student health and safety in the November 7, 2001 letter and the press conference. (*Id.*)

As discussed above, the health and safety of student athletes was indisputably at the core of Cioffi's job responsibilities. The Second Circuit thus failed to correctly anticipate this Court's holding in *Garcetti*, when it concluded that Cioffi was speaking as both a public employee and a citizen because "his primary concern was the health and safety of the students involved" in Averill Park's football program. (App. A at 16a-17a n.3.) This conclusion would obliterate the bright line drawn by this Court to exclude speech within the scope of an employee's official duties from the ambit of the First Amendment, even if such speech touches upon matters of public concern. 126 S. Ct. at 1960-61.

Absent the intervention of this Court, the Second Circuit may continue to erroneously assume that a public employee is not speaking "strictly" pursuant to his or her official duties, but rather "as a citizen who also happened to be a public employee," whenever he or she articulates a concern for health and safety, or incorporates some other matter of public concern in his or her speech. Public employers within the Second Circuit may thus continue to be forced to defend First Amendment retaliation claims, without due regard for whether an employee's speech which touches on a matter of public concern was made in his or her official capacity, in contravention of *Garcetti*. This Court should thus require the Second Circuit to revisit this case in a manner that is guided by, and consistent with, this Court's decision.

## CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted, at least to the limited extent of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for further consideration in light of *Garcetti*.

Respectfully submitted,

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# APPENDIX

# APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED APRIL 4, 2006

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 04-5593-CV

LOUIS J. CIOFFI III,

*Plaintiff-Appellant,*

v.

AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF ED., AVERILL PARK HIGH SCHOOL, AVERILL PARK CENTRAL SCHOOL DISTRICT, THOMAS P. McGREEVY and MICHAEL J. JOHNSON,

*Defendants-Appellees.*

Argued September 7, 2005

Decided April 4, 2006

CARDAMONE, *Circuit Judge*:

This appeal gives added credence to the ancient adage that the bearer of bad news has a losing office.[1] Such is literally true in this case if plaintiff's allegations are accepted. Plaintiff, a public school teacher, claims he expressed concern about a serious hazing incident to his employer the school board and, as a result, lost his job.

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[1] Yet the first bringer of unwelcome news Hath but a losing office, . . .

William Shakespeare, *The Second Part of King Henry the Fourth*, act I, sc. I, l. 100-01, *in* The Complete Works of William Shakespeare 506 (W.J. Craig ed., Oxford Univ. Press 1928).

Plaintiff Louis J. Cioffi (plaintiff or appellant) claims his job as athletic director/director of physical education was abolished by his employer defendant Averill Park Central School District in retaliation for statements he made about a hazing incident involving high school football players. Cioffi brought a § 1983 employment retaliation action against the School District, the Averill Park Central School District Board of Education (Board of Education or Board), Thomas P. McGreevy, the president of the Board of Education, and Dr. Michael Johnson, the superintendent of the School District (collectively, defendants). When defendants moved for summary judgment dismissing his complaint, the United States District Court for the Northern District of New York (Hurd, J.) granted the motion in an order dated September 30, 2004, holding that Cioffi's statements were not constitutionally protected speech and, even if they were, he had shown no causal connection between his statements and the abolition of his position. The district court also held that defendants McGreevy and Johnson could not be sued in their individual capacities because they were entitled to legislative immunity.

## BACKGROUND

From 1981 to 1999 Cioffi was a part-time social studies teacher and part-time athletic director for the Averill Park Central School District. In June 1999 the School District appointed him to the position of full-time athletic director/ director of physical education. He held that position for three years until June 2002.

As athletic director, Cioffi supervised Kevin Earl, the football coach at Averill Park Central High School. Earl coached the football team from 1994 to 2001. Over the years, Cioffi had complained to the School Board, previous superintendents, and the current superintendent defendant Johnson about Earl's coaching methods. Cioffi believed Earl was improperly supervising the players and that he was encouraging the high school athletes to use creatine, a muscle enhancing supplement that is considered dangerous.

### A. *The Hazing Incident*

In early October 2001 defendant McGreevy, the president of the Board of Education, received a letter from Lauren Ashdown, a parent of a high school football player. Ashdown relayed stories she had heard of disturbing misbehavior in the boys' locker-room such as a "shampoo bottle [being] shoved up [a student's] rectum." Cioffi and another administrator investigated Ashdown's allegations. The investigation led to an October 12, 2001 interview with a student on the football team. The student, a 14-year-old freshman, told Cioffi that he had been "tea-bagged" by other football players. Tea-bagging is a hazing act—indeed a form of sexual assault—during which the victim is pinned down on the floor by several players while another player rubs his genitalia in the victim's face. After the hazing was brought to Superintendent Johnson's attention, the School District took certain steps to address it, such as changing supervision protocols in the football locker rooms, seeking the involvement of the New York State Police, and advising parents in the School District that unspecified incidents of "sexual harassment and/or hazing" had been uncovered. The School District, however, failed to inform the parents of the freshman who had been the victim of the assault recited above.

### B. *November 7, 2001 Letter*

On November 7, 2001 Cioffi sent a letter to Superintendent Johnson which outlined his prior criticism of Coach Earl and Earl's supervision of the football team. In the letter, plaintiff expressed concern regarding the School District's handling of the subsequent investigation into the tea-bagging. He wrote also that his "overriding concern has been for the health and safety of [the] students, as well as for the school district potentially being held liable for professional misjudgment." Plaintiff requested that the superintendent forward his letter to the School Board, which Johnson did.

### C. *Events From December 2001 to February 26, 2002*

Media scrutiny and greater public interest in the hazing escalated in December 2001 when the public learned the details of the tea-bagging—specifically when the hazing victim filed a criminal complaint on December 1, 2001. This interest persisted for several months as a number of students and teachers were arrested and the entire high school football coaching staff was suspended. On January 22, 2002, however, the Board met in an executive session during which there was an informal consensus to abolish Cioffi's athletic director position as part of the budget for the coming year.

On January 31, 2002, after learning of the impending abolition of his position, Cioffi held a press conference during which he expressed his belief that the Board's decision to eliminate his position was in retribution for his criticisms regarding Coach Earl, the football program, and the investigation into the tea-bagging. Plaintiff reiterated his overriding concern for the student athletes.

A month later, on February 26, 2002, the Board met in public session to vote on the budget for the upcoming school year. It voted to approve the proposed budget which called for the abolition of Cioffi's position of athletic director. The budget created a new position, athletic director/assistant principal. The personnel change was justified on the grounds of fiscal savings to the School District. Although Cioffi lost his athletic director post, as a tenured teacher he exercised retreat rights which allowed him to return to employment as a social studies teacher at a salary lower than he earned as athletic director, but considerably higher than the pay of the teacher he replaced in the social studies department.

## DISTRICT COURT PROCEEDINGS

Cioffi brought this § 1983 action claiming defendants abolished his position in retaliation for the November 7, 2001 letter and his comments at his press conference. The district court granted summary judgment in favor of defendants on the grounds that (1) the November 7, 2001 letter and press conference are not protectable speech because they do not address matters of public concern; (2) even if Cioffi's speech constituted protectable speech, there is no causal connection between the speech and the elimination of Cioffi's job; and (3) Superintendent Johnson and President McGreevy were entitled to absolute immunity because the approval of the school budget by the Board was a legislative act. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 2004 WL 2202761, at *3-*4 (N.D.N.Y. Sept.30, 2004). Cioffi appeals. We affirm in part, vacate in part, and remand.

## DISCUSSION

### I Applicable Law

### A. *Standard of Review*

We review the district court's grant of summary judgment *de novo*, viewing the facts in the light most favorable to plaintiff and resolving all factual ambiguities in his favor. *Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 124 (2d Cir.2005); *Mandell v. County of Suffolk*, 316 F.3d 368, 376-77 (2d Cir.2003). We, like the district judge, are not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of fact for trial exists when there is sufficient "evidence on which a jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. 2505.

### B. *First Amendment Rights of Public Employees*

The rights of an individual like Cioffi to speak out on matters of public concern are enshrined in the First Amendment to the Constitution. It is well settled that public school teachers, or athletic directors, as in this case, do not check their First Amendment rights at the schoolhouse door when they enter public employment. *See Melzer v. Bd. of Educ.*, 336 F.3d 185, 192 (2d Cir.2003). Nonetheless, it is also true that a public employer has a distinct interest in regulating the speech of its employees in order to ensure and promote the "efficiency of the public services it performs." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). The problem is to balance the employee's free speech rights with the interests of the public employer. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Thus, public employees like plaintiff do not enjoy free reign to speak out without regard to the interests of their public employer. *See Bernheim v. Litt*, 79 F.3d 318, 324 (2d Cir.1996) ("A public employee's right to freedom of speech is not absolute.").

A public employee who makes a First Amendment claim of employment retaliation under § 1983 must show that: (1) his speech addressed a matter of public concern, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and that adverse employment decision, so that it can be said that the plaintiff's speech was a motivating factor in the adverse employment action. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). Even if the plaintiff establishes these three elements, his claim remains subject to several defenses. First, the state may defend its actions by showing the employee's speech disrupted the workplace. *Rankin*, 483 U.S. at 388, 107 S.Ct. 2891; *see Connick v. Myers*, 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). To prevail with this defense the public employer must demonstrate that its interest in promoting an efficient workplace outweighs the employee's interest in commenting on matters of public concern. *Connick*, 461 U.S. at 140, 103 S.Ct. 1684. Also, the employer may avoid liability by demonstrating that it would have taken the same adverse employment action "even in the absence of the protected conduct." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

### C. *Issues on Appeal*

It is undisputed that abolishing Cioffi's position as athletic director was an adverse employment action. Because defendants do not contend Cioffi's speech disrupted or had the potential to disrupt the workplace, we need not balance Cioffi's First Amendment rights against the defendants' interests in maintaining an efficient workplace. *See Velez v. Levy*, 401 F.3d 75, 95 n. 19 (2d Cir.2005). We therefore concern ourselves with whether: (1) Cioffi's speech addressed a matter of public concern; (2) a causal connection exists between his speech and the abolition of his position; and (3) the defendants would in any event have abolished Cioffi's position in the absence of his speech.

Because Cioffi did not properly raise the issue on appeal—and as we discuss in more detail in a moment—we need not address whether President McGreevy and Superintendent Johnson, the individual defendants, enjoy absolute legislative immunity. Accordingly, the district court's grant of summary judgment in favor of these two defendants on the basis of legislative immunity must be affirmed.

## II Is Plaintiff's Speech a Matter of Public Concern?

### A. *What Speech?*

We must first determine the speech at issue. Defendants contend Cioffi cannot use his January 31, 2002 press conference as the basis for his § 1983 claim because it came after the Board's informal decision to abolish his position. *Bernheim*, 79 F.3d at 325 (plaintiff "may not base her claim of retaliation upon complained-of acts that predated her speaking out"). We do not accept defendants' position.

The adverse employment action did not predate the press conference. Rather the adverse decision occurred not on January 22, 2002, but on February 26, 2002, the date of the official vote to abolish Cioffi's job. The Board's informal decision of January 22, held in executive closed session, was just that: informal. Board members were free to change their tentative votes when the official vote occurred a month later. Indeed the record reflects that what occurred on January 22 constituted no more than an "informal consensus." It was not until February 26, 2002 when the Board voted in public session, that an official adverse employment action could be said to have occurred. We therefore examine both the November 7, 2001 letter and the January 31, 2002 press conference to see if this speech relates to matters of public concern.

## B. *The Speech at Issue is a Matter of Public Concern*

The question whether speech addresses a matter of public concern and thereby enjoys protection under the First Amendment is one of law. *See Connick*, 461 U.S. at 148 n. 7, 150 n. 10, 103 S.Ct. 1684. We examine the "content, form, and context of a given statement, as revealed by the whole record" to make this determination. *Id.* at 147-48, 103 S.Ct. 1684. Generally, the First Amendment protects any matter of political, social or other concern to the community. *Morris*, 196 F.3d at 110.

Our review of the November 7, 2001 letter and January 31, 2002 press conference leads us to conclude that as a matter of law these instances of speech address matters of public concern and are therefore protected by the First Amendment. We examine the content of the speech first, followed by an analysis of its form and context.

### 1. *Content*

The letter and press conference discuss and stem from an incident of obvious concern to the public—the sexual assault of a student on school property. Any community would be acutely interested in such an incident that constitutes nothing less than a criminal attack on a minor. The incident itself, the deficiencies in adult supervision that allowed it to occur, and the possible insufficiencies of the school's response implicate the health, welfare and safety of young students, all of which are matters of importance to the public. *See, e.g., Calvit v. Minneapolis Pub. Sch.*, 122 F.3d 1112, 1117 (8th Cir.1997) (statements criticizing school child abuse policy deemed matter of public concern); *Bernheim*, 79 F.3d at 325 (statement regarding quality of education in school is a matter of public concern). State laws in New York criminalizing sexual assault and specifically sexual assault on children underscore the public's concern on this topic particularly where, as in this case, public criminal charges were filed against teachers and students in connection with such an assault. *See* N.Y. Penal Law § 130.00 (McKinney 2004) (defining sex offenses); *id.* §§ 120.16—120.17 (defining hazing); *cf. Munafo v. Metro. Transp. Auth.*, 285 F.3d 201, 212 (2d Cir.2002) ("[O]ne would need look no farther than the existence of . . . similar state laws to recognize that safety in the workplace is a matter of public concern.").

To be sure, while the case before us involves a hazing incident that happens to constitute sexual assault, we do not imply that to be a matter of public concern an event need rise to the level of criminality. As noted above, the protections of the First Amendment are not so constrained. A matter of public concern is generally "any matter of political, social or other concern to the community." *Morris*, 196 F.3d at 110 (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. 1684). We do not doubt that criminal activity in schools is of "social" or "other" concern to communities. Nor do we doubt that non-criminal activities may also be—depending on their form, context and content—matters of public concern, discussion of which is equally protectable under the First Amendment. *See, e.g., Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178 (5th Cir.2005) (holding speech about reasons for school principal's resignation a matter of public concern).

In both the letter and press conference plaintiff addresses two issues that are of paramount interest to a community faced with a hazing incident in its schools: first, how the School District allowed such an incident to occur and, second, how the School District conducted its investigation into the hazing. With regard to how the hazing was allowed to occur, in his letter Cioffi discusses perceived defects in the level of oversight and supervision over Earl and the football program leading up to the incident. He states that Earl "was 'allowed' to run by a different set of rules from other faculty members and coaches." Cioffi also chronicles his many complaints about the football program over the years, indicating that his alarms were raised to no avail. Cioffi ends his letter voicing consternation about the manner in which the Board and school administration conducted the investigation. He states that he has "a problem accepting [the] explanation about why perpetrators [of the hazing] have not actively been sought out" and that his concern was that "others may have been victimized as well." At the press conference, Cioffi addresses again and in detail these same issues of oversight of Earl and the football program and the School District's handling of the hazing investigation. The content of the letter and press conference that we have pointed to here establish the very public nature of Cioffi's speech.

### 2. *Form and Context*

The form and context of the letter and press conference also favor Cioffi. Although Cioffi sent the November 7 letter privately to Johnson and the Board only, it is not thereby deprived of First Amendment protection. *See Rankin*, 483 U.S. at 386 n. 11, 107 S.Ct. 2891 ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 46 (2d Cir.1983) ("That [plaintiff's] speech was made privately, rather than publicly, did not remove it from First Amendment protection."). The subject of the letter was no mere private employment grievance, but assaultive conduct against a minor that, when publicly disclosed, triggered criminal charges as well as public outcry. As for the press conference, its form is plainly public, with Cioffi's remarks specifically directed to the community and the media.

Next we examine the context in which Cioffi spoke. Such review further convinces us that his speech addresses matters of public concern. Defendants admit that both the letter and press conference occurred while a media frenzy ensued around the hazing. In short, this is not a case in which we must divine the public's interest in the subject matter of plaintiff's speech. To gauge the community's interest in Cioffi's speech we need only look to the abundant press coverage accorded the hazing. *See Salge*, 411 F.3d at 188 (noting community's interest in subject matter of plaintiff's speech and fact that speech was made against backdrop of existing community debate). We do not mean to say that if there is no media interest in the subject matter of the employee's speech that the speech is not of public concern. Rather in this case, the fact of actual public interest further convinces us that Cioffi's communications touch upon matters of public concern.

After considering the content, form and context of the letter and press conference, we hold that both constitute protectable speech, addressing matters of public concern.

### C. *Defendants' Response—Primary Purpose Argument*

Notwithstanding the above, defendants urge us to focus solely on Cioffi's purpose in speaking out. They contend the speech relates only to personal matters because Cioffi's "primary purpose" in writing the letter and holding the press conference was to save his job by denying any personal responsibility for the hazing incident. This argument is unavailing.

To begin with, defendants' contention that a speaker's primary motivation for speaking is dispositive in determining whether speech is personal or public conflicts directly with the Supreme Court's holding in *Connick.* There, a public employee distributed a questionnaire to fellow co-workers in order to marshal support for her personal grievance with superiors. *Connick*, 461 U.S. at 148, 103 S.Ct. 1684. Although personal interest primarily motivated the speech, the Supreme Court concluded that one of the questions on the questionnaire touched upon a matter of public concern and was thus protected by the First Amendment. *Id.* at 148-49, 103 S.Ct. 1684. In other words, although the speaker's overall motivation was personal, that fact was not dispositive.[2] If it were, then the Supreme Court's direction that we examine the content, form, and context of a given statement to determine whether it addresses a matter of public concern would be stripped of its meaning and purpose.

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[2] While the *Connick* Court held that one question on the questionnaire was a matter of public concern, the Court ultimately held in favor of the government after balancing the government's interest against the employee's free speech interest. *See Connick*, 461 U.S. at 150-54, 103 S.Ct. 1684.

Our analysis is content-based and not, as defendants would have it, solely motivation-based. *See Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 575 (6th Cir.1997). As the Sixth Circuit stated in rebutting an argument identical to that offered by defendants here, *Connick* recognized the distinction between "*matters* of public concern and *matters* only of personal interest, not civic-minded motives and self-serving motives." *Id.* Having a personal stake or motive in speaking does not, on its own, vitiate the status of the speech as one of public concern. *See Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir.2003); *Munafo*, 285 F.3d at 211-12 (rejecting contention that plaintiff's speech not of public concern because plaintiff motivated by personal interest); *Brennan v. Norton*, 350 F.3d 399, 413 (3d Cir.2003) (while speaker's motive is relevant part of context of speech, it is not dispositive when determining whether the speech relates to a matter of public concern); *O'Donnell v. Barry*, 148 F.3d 1126, 1134 (D.C.Cir.1998) (motivation is a factor in the public concern analysis but does not destroy character of speech as matter of public concern).

Moreover, we are not persuaded as a matter of law that plaintiff was motivated solely by personal interest. In the November 7 letter he states that his "overriding concern has been for the health and safety of [the] students, as well as for the school district potentially being held liable for professional misjudgment." Plaintiff reiterated these motivations during his press conference. We do not doubt that he spoke partly to protect his job and shift blame to other administrators. But personal interests frequently induce speech that is nonetheless of public concern.

*See, e.g.*, *Johnson*, 342 F.3d at 114 ("[T]he mere fact that [plaintiff] took a personal interest in the subject matter of the speech does not remove the letter from the protection of the First Amendment."). Motive may inform our inquiry, *see Brennan*, 350 F.3d at 413; *O'Donnell*, 148 F.3d at 1134, but as noted above, even an entirely personal motive in speaking is not dispositive, *see Connick*, 461 U.S. at 148-49, 103 S.Ct. 1684.

Indeed, defendants' portrayal of Cioffi's speech as a "don't blame me" measure bolsters, rather than diminishes, the public nature of the speech. By proclaiming that he is not to blame, Cioffi presents a theory of what went wrong and who is to blame. We extend First Amendment protection to public employees not only in furtherance of their interest in speaking, but also in furtherance of the public's interest in obtaining information about matters of public import from those in the best positions to know most about it; or, as the Supreme Court instructs, "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).[3]

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[3] The Supreme Court's forthcoming decision in *Garcetti v. Ceballos*, *cert. granted*, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), as to whether the First Amendment protects an employee's purely job-related speech about a matter of public concern expressed pursuant to the duties of employment, does not affect the disposition of this case because the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen, who also happened to be a public employee, about the circumstances that led

(Cont'd)

A school official, like Cioffi, who supervised the School District's athletic programs and personally investigated the initial allegations of hazing, is well suited to provide information to local citizens and parents regarding this matter of public concern. Were we to accept defendants' proposition that Cioffi's speech is not a matter of public concern simply because it personally and directly affects him "would mean that only those persons with the least amount of firsthand knowledge about the subject matter could utter speech without fear of government reprisal." *Johnson*, 342 F.3d at 114. As painful and embarrassing as it may be to defendants, the public has a pointed interest in obtaining information not only about the fact of the hazing, but also the possible administrative failures that allowed it to occur. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (recognizing criticisms of public officials is at core of speech protected by First Amendment).

Of course we have no opinion with respect to the truthfulness of Cioffi's speech and whether he, the Board of Education, or other administrators are to blame. The truth of his statements, especially on summary judgment, does not bear on whether the speech is personal or public. *Salge*, 411 F.3d at 185 ("Whether an employee's speech is true or false also plays no role in the determination whether the speech concerned a matter of public interest."); *see also Konits*, 394

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(Cont'd)

to criminal activity in the public school system and the manner in which school officials were responding to that conduct. In both the November 7 letter and the subsequent press conference, Cioffi emphasized that his primary concern was the health and safety of the students involved.

F.3d at 124 (resolving ambiguities and drawing factual inferences in favor of plaintiff).

In support of their primary purpose test defendants mistakenly seize upon *Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775 (2d Cir.1991). We did not hold in *Ezekwo* that when a speaker is motivated by personal interest, that alone takes the speech out of the public sphere. Nor did we articulate a primary purpose test. Rather, we applied *Connick* 's content, form and context test, holding that "[v]iewed objectively and as a whole, [the public employee's] statements did not address matters of public concern." *Id.* at 781. While the employee's motive in *Ezekwo* informed our analysis, it was only one of many factors considered under the settled test of content, form and context. To the extent defendants read *Ezekwo* to announce a primary purpose test, they are mistaken.

## III Causation

We now turn to the question of causation. The district court held that even if Cioffi's speech is protected, there was no causal connection between his speech and the abolition of his position. *Cioffi*, 2004 WL 2202761, at *3. We are unable to adopt this view as a matter of law.

To establish causation, a plaintiff must show that the protected speech "was a substantial motivating factor in the adverse employment action," *Morris*, 196 F.3d at 110, and we review the record only to determine whether Cioffi has presented evidence sufficient to raise a triable issue on causation, *see Anderson*, 477 U.S. at 249, 106 S.Ct. 2505;

*Hale v. Mann*, 219 F.3d 61, 71 (2d Cir.2000). In our view, Cioffi has done so. A plaintiff may establish causation indirectly by showing his speech was closely followed in time by the adverse employment decision. *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir.2001); *Morris*, 196 F.3d at 110. Only a short time passed from Cioffi's speech to the abolition of his job. The Board abolished Cioffi's position on February 26, 2002, a little over three months after his November 7, 2001 letter and only three weeks after his January 31, 2002 press conference. We cannot agree that these time periods are too long for any inference of retaliatory motive and causation to be drawn. No "bright line . . . define[s] the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Gorman-Bakos*, 252 F.3d at 554. We do not attempt to determine the outer limits of temporal proximity, nor do we need to.

On the facts of this case, the lapse of only several months after the letter and several weeks after the press conference between the protected speech and adverse employment action is sufficient to support an allegation of a causal connection strong enough to survive summary judgment. *See id.* at 555 (passage of up to five months short enough for causal connection); *Richardson v. New York State Dep't of Corr. Service*, 180 F.3d 426, 446-47 (2d Cir.1999) (acts within one month of receipt of deposition notices may be retaliation for initiation of lawsuit more than one year earlier); *Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir.1980) (eight month gap between EEOC complaint and retaliatory act suggested causal relationship).

## IV Absent Plaintiff's Speech Would Defendants Have Abolished His Position?

We turn next to defendants' defense that absent Cioffi's letter and press conference, they would have abolished his job anyway. *See Mount Healthy*, 429 U.S. at 287, 97 S.Ct. 568. Defendants declare the School District faced a budgetary crisis and the abolition of Cioffi's job created a net cost benefit to the District. Defendants would have therefore abolished his position for these budgetary reasons even had he never written the letter or held the press conference.

Plaintiff presented facts to the contrary. As the district court noted, based on the facts viewed most favorable to Cioffi, the Board decided to abolish his job "despite the fact there was no real fiscal crisis." *Cioffi*, 2004 WL 2202761, at *2. With no budgetary crisis, a reasonable jury could find that the defendants would not have taken the same action against Cioffi absent the letter and press conference. Cioffi also presented facts disputing the cost benefit to the School District. The reorganization resulted in the creation of a new position—athletic director/assistant principal. The School District hired someone to fill this new position at a salary lower than Cioffi's. But Cioffi, as a tenured teacher, exercised his retreat rights, requiring the School District to continue employing him as a teacher at a salary which was lower than his previous salary, but considerably higher than the teacher he replaced. These facts call into question the allegation that the School District had in fact achieved a net savings by abolishing Cioffi's position. These factual disputes preclude granting summary judgment for defendants on the basis of this defense.

### V Absolute Immunity of Individual Defendants

We pass finally to the issue of absolute immunity, or, rather, why we decline to reach that issue. The district court held that "the two individual defendants, [Superintendent] Johnson and [President] McGreevy, are entitled to absolute legislative immunity because [Cioffi's] position was eliminated as part of the budgetary process, a legislative activity." *Cioffi*, 2004 WL 2202761, at *4. Neither Cioffi's notice of appeal nor his opening brief discuss, let alone dispute, the district court's holding that absolute legislative immunity protects the two individual defendants from suit. The first time the issue of legislative immunity is raised is in plaintiff's reply brief. As such, the issue is not properly before us, because we deem it waived. *See* Fed. R.App. P. 28(a)(5), (9) (setting forth what appellant must include in his briefing); *Thomas v. Roach*, 165 F.3d 137, 145-46 (2d Cir.1999) (refusing to consider argument raised for the first time in appellant's reply brief).

Defendants' motion to strike that part of Cioffi's reply brief, which raises for the first time the issue of legislative immunity, is granted. We decline, however, defendants' request to assess sanctions against plaintiff in the form of attorney's fees and costs.

## CONCLUSION

We affirm the district court's judgment insofar as it granted summary judgment in favor of the individual defendants, Johnson and McGreevy, and dismissed plaintiff's complaint against them; we vacate the grant of summary judgment in favor of the School District, Board and other municipal defendants, and remand to the district court for further proceedings consistent with this opinion.

Affirmed in part, vacated in part, and remanded.

# APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED SEPTEMBER 30, 2004

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF NEW YORK**

1:02-CV-887

LOUIS J. CIOFFI, III,

Plaintiff,

vs.

AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION; AVERILL PARK HIGH SCHOOL; AVERILL PARK CENTRAL SCHOOL DISTRICT; THOMAS P. McGREEVY; and MICHAEL J. JOHNSON,

Defendants.

## MEMORANDUM-DECISION AND ORDER

### I. INTRODUCTION

The complaint alleges three causes of action: First Amendment retaliation, due process, and conspiracy to violate plaintiff's civil rights. Defendants move for summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff opposes. Oral argument was heard on August 27, 2004, in Albany, New York.

## II. FACTS

The following facts are not in dispute or are viewed most favorable to the nonmoving plaintiff.

Plaintiff Louis Cioffi ("Cioffi" or "plaintiff") was employed by the defendant Averill Park Central School District ("District") since 1979. He was a part-time social studies teacher and part time Athletic Director from 1981 to 1999. In June 1999 he was promoted to a full-time administrative position, Athletic Director and Director of Physical Education (a tenured position).

Kevin Earl ("Earl") was hired by the District in 1994. He was a physical education teacher and head varsity football coach.

The relationship between Cioffi and Earl was acrimonious from the beginning. Plaintiff continuously complained about how Earl ran the football program, saying that the program was out of control.

Defendant Thomas McCreevy ("McCreevy") was a member of the defendant Averill Park Central School District Board of Education ("School Board") from 1992 to June 30, 2002, and was president from 1998 to June 2002.

Defendant Dr. Michael Johnson ("Johnson") was Superintendent of Schools during the relevant times. Due to the tension between Cioffi and Earl, Johnson took a direct role in mediating relationships between them beginning in mid-2000. He changed Earl's teaching assignment from the high school to the middle school so he would have less contact with plaintiff. He also directed that plaintiff was to treat Earl fairly.

During the summer of 2000, Cioffi's criticism of Earl became more public, and newspaper articles and other media coverage appeared regarding the controversy. Plaintiff, at some point in time, recommended that Earl not be reappointed head football coach. Earl was, however, reappointed. After Earl's reassignment to the middle school, there was a public outcry because he would have less contact with the high school football players. A High School Climate Committee was formed to help diffuse the situation.

In the fall of 2000 it came to light that Cioffi lacked the required Physical Education Certification to hold the position of Director of Physical Education. Johnson asked him to obtain the certification, but plaintiff contended that because of lingering physical effects from an electric shock he received the previous year, he was unable to do so. Therefore, special arrangements were made for plaintiff to remain in the full-time administrative position of Athletic Director by designating another teacher, Rit Aldi (who had the required Physical Education Certification), as Director of Physical Education with a $1,600 per year stipend.

In November 2000, Cioffi and other teachers went to the School Board to complain about Earl. They complained about Earl's coaching of the football team and accused the football players of using performance-enhancing substances.

In October 2001, it became known that a hazing incident had occurred in the high school locker room which involved a junior varsity football player. Cioffi complained about the way the incident was handled by the School Board, alleging that there was a cover-up to protect Earl. On November 7, 2001, plaintiff and the high school principal sent identical letters to Johnson, asking for the letters to be forwarded to the School Board. In the letter the plaintiff essentially disclaimed any personal responsibility for the hazing (as did the high school principal in her letter). Johnson and McGreevy were angry when they received the letters.

Earl and all the other football coaches were suspended from coaching football for the 2002-2003 school year. Earl has not returned to coaching.

On January 22, 2002, the School Board informally decided to reorganize some administrative positions in order to save money despite the fact there was no real fiscal crisis. It was decided to abolish plaintiff's position as Athletic Director effective June 2002, and to create a combined Director of Physical Education/High School Assistant Principal position with a starting date of July 2002. Because plaintiff did not have the required Physical Education Certificate, he could not apply for this new position.

When plaintiff heard that the School Board intended to eliminate his position, he called a press conference. In his January 31, 2002, press conference statement plaintiff was attempting to save his job, defend his personal reputation, blame the administration for the hazing incident, and complain about his treatment at work.

On February 26, 2002, it was formally announced that Cioffi's Athletic Director position was abolished in the proposed budget.

Cioffi exercised his right to "retreat" to a teaching position, and taught social studies during the 2002-2003 school year. He acquired his Physical Education Certificate in June 2003, and went to another school district as Director of Athletics and Physical Education in September 2003.

## III. DISCUSSION

### A. *Summary Judgment*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

### B. *First Amendment*

The elements of a First Amendment retaliation claim are (1) the speech was constitutionally protected; (2) there was an adverse employment decision; and (3) a causal connection exists between the speech and the adverse employment decision. *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir.1999). There does not seem to be a serious dispute that there was an adverse employment decision, abolition of plaintiff's position, so only the first and third elements need be discussed.

In order to be protected by the First Amendment, speech by a public employee must be regarding a matter of public concern. *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2d Cir.1993). Personal workplace grievances are not protected. *Connick v. Myers*, 461 U.S. 138, 145-146 (1983). A causal connection between the protected speech and the adverse employment decision may be established with direct evidence of retaliatory animus or circumstantial evidence such as temporal proximity. *Morris*, 196 F.3d at 110.

Other than general complaints he made about Earl over the years from 1994 to early 2002, plaintiff alleges only two specific incidents of speech. Plaintiff's general complaints about Earl over the years were employment matters between a supervisor and his subordinate. Even if considered matters of public concern, there was no causal connection established between complaints that occurred over nearly a decade and the eventual abolition of plaintiff's position. Lack of a causal connection is particularly apparent in light of his promotion to a full-time tenured administrative position in 1999 and his retention in that position after the fall of 2000 despite lacking the required Physical Education Certificate.

The first specific incident of speech alleged is the November 7, 2001, letter to the School Board. The letter was an attempt by plaintiff to avoid personal responsibility for the hazing incident. This was an employment matter, since as Athletic Director plaintiff would seemingly be responsible for the action or inaction of athletic coaches under whose watch the hazing incident occurred.

The second specific incident of speech alleged is the January 31, 2002, press conference. The press conference was called by the plaintiff in response to hearing that defendants intended to abolish his position. He called the press conference in a last-ditch effort to save his job. Clearly this is an employment matter. Both specific incidents of speech were employment matters not protected by the First Amendment, rather than matters of public concern entitled to free speech protection.

Even if considered to be matters of public concern, there is no evidence of a causal connection. There is no direct evidence of retaliatory animus. Also, there is no circumstantial evidence such as temporal proximity from which an inference of retaliation could be made. The letter was written in November 2001, and the decision to abolish plaintiff's position was not made until January 2002. Further, the press conference occurred after the defendants already made the informal decision to abolish plaintiff's position—in fact, plaintiff called it in response to that very decision. *See Brown v. Massena Memorial*, No. 99-CV-1729, 2000 WL 381941, at *5 (N.D.N.Y. Apr. 11, 2000) (noting that the protected speech must have occurred prior to the employment action in order for there to be a causal connection).

Thus, even viewing the evidence favorable to the plaintiff, the general complaints and the two specific incidents, the November 2001 letter and the January 2002 press conference, involved personal employer/employee matters between plaintiff and defendants, rather than matters of public concern. Even if considered to be matters of public concern, there is no evidence of a causal connection between the general complaints, the letter, and/or the press conference and the abolition of plaintiff's position.

Plaintiff's First Amendment claim will be dismissed.

### C. *Due Process*

Plaintiff was not entitled to a predeprivation hearing because New York Education Law sections 2510 and 3013 were followed to properly abolish his position. *See Elmendorf* *v. Howell*, 962 F.Supp. 326, 332 (N.D.N.Y.1997). A possible exception exists when a new position is created and the person holding the abolished position could be appointed to the new position. *Id.* at 333. In this scenario, a due process violation could occur if the person was not appointed to the new position. However, the new position must be "similar" and the individual must be qualified for the new position. Here, even if the new position of Director of Physical Education/High School Assistant Principal created by the School Board is considered similar to Athletic Director, plaintiff was not qualified for the new position because he did not have the Physical Education Certificate. Therefore, he does not fall into the exception.

Further, Article 78 of the New York Civil Practice Law and Rules provided an adequate remedy in the form of a post deprivation hearing, to which plaintiff did not avail himself.

Plaintiff's due process claim will be dismissed.

### D. *Conspiracy/Individual Defendants*

With regard to the conspiracy claim, there can be no conspiracy between the School District and its officers, employees, and Board of Education members because they are considered a single entity. *See Hull v. Cayuga Valley Bd. of Educ.*, 926 F.2d 505, 509-10 (6th Cir.1991) (citing *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.1978). In addition, the two individual defendants, Johnson and McGreevy, are entitled to absolute legislative immunity because the position was eliminated as part of the budgetary process, a legislative activity. *See Harhay v. Town of Ellington*

*Bd. of Educ.*, 323 F.3d 206, 211 (2d Cir.2003). There is also no indication that the claims in the complaint are made against the individual defendants acting in anything other than their legislative capacities, so there is no exception to immunity. *See Bogan v. Scott-Harris*, 423 U.S. 44, 55 (1998) (finding that official performing budgetary functions is entitled to absolute legislative immunity despite any individual intent or motive).

The conspiracy claim will be dismissed.

## IV. CONCLUSION

Plaintiff's claims involve personal conflicts between himself and the defendants involving his duties and responsibilities as Athletic Director for the school district. These personal employment conflicts between an employee and his supervisor or his employer do not come close to rising to the level of a constitutional or civil rights claim. Therefore, the entire complaint, having no merit, must be dismissed.

Accordingly, it is

ORDERED, that

1. Defendants' motion for summary judgment is GRANTED; and

2. The complaint is DISMISSED.

The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

s/ David N. Hurd
United States District Judge

Dated: September 30, 2002
Utica, New York

Supreme Court, U.S.
FILED
AUG 30 2006
OFFICE OF THE CLERK

②

No. 06-1

IN THE

# Supreme Court of the United States

AVERILL PARK CENTRAL SCHOOL DISTRICT, AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, and AVERILL PARK HIGH SCHOOL,

*Petitioners*,

*v.*

LOUIS J. CIOFFI, III,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

# BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. In *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), this Court held that the First Amendment does not protect statements made by public employees pursuant to their official job duties. In the decision below, the Second Circuit considered the potential impact of *Garcetti v. Ceballos* and concluded that Respondent's speech was not made pursuant to his official job duties, a conclusion that is fully supported by the record and is consistent with Petitioner's position during the proceedings below. Should this Court nevertheless grant, vacate, and remand the case in light of *Garcetti v. Ceballos*?

2. Should the Court grant plenary review to create an analytical framework for the application of this Court's decision in *Garcetti v. Ceballos* or allow the lower courts first to develop the law on a full record?

## TABLE OF CONTENTS

*Page*

Questions Presented .......................... i

Table of Contents .......................... ii

Table of Cited Authorities .......................... iii

Summary of Reasons for Denying the Petition .... 1

Statement of Facts .......................... 3

Reasons for Denying the Petition .............. 6

I. The Second Circuit's Decision Neither Undermines Nor Conflicts With This Court's *Garcetti* Decision; Therefore, No Purpose Is Served By Remanding This Case To Restate A Rule Of Law That Has Already Been Correctly Stated. ...................... 6

II. This Case Is Not In A Posture Where Plenary Review Or Remand Would Allow This Court Or The Lower Courts To Articulate And Develop A Comprehensive Framework For Applying *Garcetti v. Ceballos*. .......... 11

Conclusion .............................. 14

Appendix — Job Description Of The Duties And Responsibilities Of The Director Of Athletics And Physical Education Dated September 25, 1991 And Revised June 1, 1999 ................. 1a

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Buazard v. Meridith*, 172 F.3d 546 (8th Cir. 1999) . . . 12

*Connick v. Myers*, 461 U.S. 138 (1983) . . . . . . . . . . 10

*Cahill v. O'Donnell*, 75 F. Supp.2d 264 (S.D.N.Y. 1999) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

*DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995) . 12

*Ethier v. City of Cohoes*, 2006 U.S. Dist. LEXIS 20647 (N.D.N.Y. 2006) . . . . . . . . . . . . . . . . . . . . 12

*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) . . . . *passim*

*Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir.1993) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

*Lawrence v. Chater*, 516 U.S. 163 (1996) . . . . . . . .2, 6, 8

*Pickering v. Board of Educ.*, 391 U.S. 563 (1968) . . . 2, 5

*San Diego v. Roe*, 543 U.S. 77 (2004) . . . . . . . . . . . 10

*Schad v. Jones*, 415 F.3d 671 (7th Cir. 2005) . . . . . 12

*Singleton v. Wulff*, 428 U.S. 106 (1976) . . . . . . . . . 11

*Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992) . . . 12

*Cited Authorities*

*Page*

**Rule:**

U.S. Sup. Ct. R. 10 . . . . . . . . . . . . . . . . . . . . . . . . . . 10

## SUMMARY OF REASONS FOR DENYING THE PETITION

The Second Circuit correctly framed the issue raised by *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006): "whether the First Amendment protects an employee's purely job-related speech about a matter of public concern expressed pursuant to the duties of employment." App. A at 16a-17a n.3. The Second Circuit then answered that question based on its review of the factual record: "***[T]he record here*** establishes that [Lou] Cioffi's speech was not made strictly pursuant to his duties as a public employee." App. A at 16a-17a n.3. [emphasis added]

The Averill Park School District ("Averill Park") comes to this Court complaining bitterly that the Second Circuit failed to apprehend the facts of this case correctly. But that is not a basis for seeking the intervention of this Court. *Certiorari* is not granted to review "erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10.

Since the Second Circuit applied the correct rule of law to the facts before it, remand to the Second Circuit would not serve any useful purpose. For three reasons, this is simply not a case which could contribute in any meaningful way to the process by which the District Courts and Circuit Courts of Appeals articulate a comprehensive framework for defining the scope of an employee's duties in the wake of *Garcetti v. Ceballos*.

First, the Second Circuit found that the *Garcetti* rule does not apply to this case. The Second Circuit realized that Cioffi's speech might not be protected if it were uttered pursuant to his duties as a public employee. In applying this principle to the record before it, the Second Circuit found that

> Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen, who also happened to be a public employee, about the circumstances that led to criminal activity in the public school system and the manner in which school officials were responding to that conduct.

App.A at 16a-17a n.3. Cioffi went beyond the bounds of his job duties in speaking to the Board of Education and to the public, so the principle of *Garcetti v. Ceballos* was simply inapplicable. Remand would serve no useful purpose because "the decision below [does not] rest[] upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Second, petitioner Averill Park, in the Courts below, denied that Mr. Cioffi's speech was within the category which *Garcetti v. Ceballos* defined as unprotected, *i.e.*, the class of internal communications that a governmental agency must control in order to maintain orderly operations. 126 S. Ct. at 1958 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Averill Park admitted in the Second Circuit that Mr. Cioffi's should not be evaluated from this standpoint. "[A] *Pickering* balancing test is not required . . . Defendants have never contended that Cioffi's position was abolished because of his speech, or that its decision was justified because of any disruptiveness of his speech." Averill Park Second Circuit Brief, p. 29 n.3. This case was never about maintaining discipline in the course of internal communications. It was always about speech to the Board of Education and to the public that was outside the realm of Mr. Cioffi's everyday job duties

Third, the Second Circuit only has denied Averill Park summary judgment and has remanded the case for trial. A trial will allow development and clarification of the issues, and if necessary an appeal. Because this case is at an interlocutory stage, and because Averill Park raises a factual defense (namely that Averill Park fired Cioffi for budget reasons and not speech reasons) that would, if accepted, eliminate the federal constitutional free speech question, there is no need for this Court to intervene now and render an advisory opinion on a constitutional question.

There inevitably will be cases where the parties raise the *Garcetti* issue, have extensive discovery, and then brief the issue to the courts. But, as Mr. Cioffi's case lacks such antecedent events, it is clearly an inappropriate vehicle for further development of the analytical framework on the relevant issue. Averill Park should not be able to force the Second Circuit and Mr. Cioffi to waste resources to re-state a rule of law that has already been correctly stated. Therefore, this Court should deny the Averill Park's petition for *certiorari.*

## STATEMENT OF FACTS

The football coach at Averill Park High School was out of control. He encouraged his players to use prohibited performance enhancing substances, shrouded his program in cult-like secrecy, turned a blind eye to hazing of young players, and manipulated the public to pressure the Superintendent to keep his job. Ultimately, a sexual assault on a young player occurred in the locker room. A fair reading of the evidence shows that the Superintendent, who personally had taken charge of the football program, tried to cover-up the sexual assault. JA652, 655-57, 659-61, 663-672, 674-87, 693, 695.[1] In particular, Superintendent tried to cover-up the incident by hiding it from the parents of the child who was victimized (App. A at 4a), by misleading the State police (JA947-949), by failing to continue the investigation to determine the full extent of the wrongdoing, and by denying even there was a victim (JA679).[2]

Lou Cioffi was the Athletic Director at Averill Park. The hazing incident, the effort to hide it from the parents of the victim, and Averill Park's pretension that there was no victim was so appalling to Lou Cioffi that it caused him to speak out. Mr. Cioffi (and High School Principal Nancy Noonan) wrote a letter to the Board of Education concerning the

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[1] JA refers to the joint appendix before the Second Circuit.

[2] The cover-up was noted by the New York State Police Senior Investigator assigned to the case. The Investigator testified that she was told by the District that the victim "had left the school for reasons unrelated to the locker room problems, and that what had happened was not of concern to that student" [JA947]. When the victim's mother filed a criminal complaint, the State Police realized they had been misled.

> Our investigation was conducted independently of the District without their assistance and came about as a result of [the victim's] mother contacting my office. . . . When I learned what had happened to [the victim], I was concerned about the fact school officials had been advised by [the victim] shortly after the incident and no action had been taken by school administrators to commence an investigation into this behavior or to hold students accountable.

*Id.*

Superintendent's willingness to overlook and even cover-up the abuses of the football program. App. A at 12a. As a result of the letter to the School Board, and the ensuing press conference, Cioffi was removed from his position as Athletic Director under the pretext of a budget crisis and Noonan was transferred to the bus garage. JA655-77, 681, 689-690, 695-696, 919-923, 1222-1226.

Cioffi filed suit in the United States District Court for the Northern District of New York alleging that his position was eliminated in retaliation for exercising his First Amendment rights. After extensive discovery, the Averill Park moved for summary judgment, arguing that Cioffi's letter and subsequent press conference concerning the hazing incident was not a matter of public concern. The District Court agreed. It found that Cioffi's letter and press conference was not protected speech under the First Amendment. Cioffi appealed.

The Second Circuit reversed and ordered a trial. The Second Circuit held that Cioffi's speech was a matter of public concern. "In both the letter [to the Board of Education] and press conference plaintiff addresses two issues that are of paramount interest to a community faced with a hazing incident in its schools: first, how the School District allowed such an incident to occur and, second, how the School District conducted its investigation into the hazing." App. A at 12a. Since Averill Park admitted that it had no legitimate governmental interest in restricting Cioffi's speech, the Second Circuit did not follow with a *Pickering* analysis. *See* Averill Park's Brief in the Second Circuit at p. 29 n.3 (informing the Circuit Court that "a *Pickering* balancing test is not required."). Finally, the Second Circuit concluded that there was ample evidence for a jury to conclude that Averill Park eliminated Cioffi's position in retaliation for his speech.

Averill Park never argued that Cioffi's letter and press conference were made pursuant to his duties as an Athletic Director and thus were not protected by the First Amendment. The Second Circuit nonetheless was mindful of this issue, and prior to rendering a decision, examined the record to determine if the issue presented to this Court in *Garcetti v. Ceballos* was applicable to Mr. Cioffi's case as well. App. A at 16a-17a n.3. Based upon its review of the record, the Second Circuit concluded that Mr. Cioffi was speaking as a private citizen outside the scope of his ordinary job duties. *Id.*

## REASONS FOR DENYING THE PETITION

### I. THE SECOND CIRCUIT'S DECISION NEITHER UNDERMINES NOR CONFLICTS WITH THIS COURT'S *GARCETTI* DECISION; THEREFORE, NO PURPOSE IS SERVED BY REMANDING THIS CASE TO RESTATE A RULE OF LAW THAT HAS ALREADY BEEN CORRECTLY STATED.

Remand is appropriate only when "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). This is not the case here. The Second Circuit considered the issue presented in *Garcetti* and found it inapplicable. Thus, remand to the Second Circuit would serve no useful purpose.

The Second Circuit explicitly considered and addressed *Garcetti*:

> The Supreme Court's forthcoming decision in *Garcetti v. Ceballos, cert. granted,* 543 U.S. 1186 (2005), as to whether the First Amendment protects an employee's purely job-related speech about a matter of public concern expressed pursuant to the duties of employment, does not affect the disposition of this case because the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee. Rather, he was speaking as a citizen, who also happened to be a public employee, about the circumstances that led to criminal activity in the public school system and the manner in which school officials were responding to that conduct. In both the November 7 letter and the subsequent press conference, Cioffi emphasized that his primary concern was the health and safety of the students involved.

App. A at 16a-17a.

The Second Circuit could not have made clearer its understanding that even speech on a matter of public concern would not be protected if it was uttered as part of a public employee's job duties. However, "the record here establishes that Cioffi's speech was not made strictly pursuant to his duties as a public employee." *Id.*

In light of the Second Circuit's review of the record, remand is inappropriate – "the decision below [does not] rest[] upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). In other words, if redirected to this Court's decision in *Garcetti v. Ceballos*, there is no reason to believe the Second Circuit would reach a different result. It already applied the correct rule of law to the factual record.

There is no basis for quarrelling with the Second Circuit's formulation of the threshold inquiry presented by *Garcetti*: "whether the First Amendment protects an employee's purely job-related speech about a matter of public concern expressed pursuant to the duties of employment." App. A at 16a-17a n.3. The Second Circuit accurately identified the critical issue – in what capacity did Cioffi utter his speech – pursuant to the requirements of his job or as a private citizen. *Compare*, *Garcetti*, 126 S. Ct. at 1960-61 (holding that "[t]he controlling factor . . . is that [Ceballos'] expressions were made pursuant to his duties as a calendar deputy.").

There is plentiful support in the record for the Second Circuit's conclusion. Averill Park itself told the Second Circuit that Mr. Cioffi went outside the parameters of his ordinary job duties in writing to the Board of Education. The Superintendent swore that "[t]he Athletic Director reported, at different times and for different purposes, to the High School Principal, the Assistant Superintendent and the Superintendent." [JA1108]. This statement accurately reflects Cioffi's job description [JA115-118], which is annexed to this brief as Appendix 1. It is beyond dispute that Cioffi did not report to the Board of Education. He did not participate in policy-making at the Board level. And, the Superintendent did not wish him to take the extraordinary step of writing to the Board. Yet, Cioffi, like parents who also wrote to the Board, felt morally obligated to express his views as to the inadequacy of Board policy concerning a hazing problem that had already attracted massive media attention. App. A at 13a. The Second Circuit understood the record and concluded that Cioffi spoke as a citizen on a matter of public concern.

Petitioner tries to impugn this conclusion by arguing that the Second Circuit's analysis of *Garcetti v. Ceballos* focused incorrectly on the content of Cioffi's speech, rather than upon the capacity in which it was spoken. In the most qualified and vague terms, petitioner argues that the Second Circuit "*appears to have assumed* that Cioffi was simultaneously speaking as a citizen, while carrying out his officials duties, solely because his speech touched on matters of public concern." (emphasis added).

This argument is not faithful to the text of the Second Circuit's opinion. That opinion acknowledges and rests on the proposition that "purely job-related speech about a matter of public concern expressed pursuant to the duties of employment" would not be protected. App. A at 16a. The Second Circuit's ruling fully complies with the legal underpinnings of *Garcetti v. Ceballos*. The Circuit Court made no "apparent assumption" to the contrary.

Averill Park's real complaint is that it thinks the Second Circuit failed to apprehend the facts of this case correctly. Averill Park spends most of its energies decrying the Second Circuit's failure to see that Cioffi's speech was in fact self-serving and personally motivated.[3] In essence, petitioner disagrees with the Second Circuit's view of the record in this case. But, that is not a basis for seeking the intervention of this Court. *See* S. Ct. Rule 10.

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[3] The bulk of the factual disputes which petitioners identify have nothing at all to do with the *Garcetti* issue but relate to the question which occupied defendant's attention in both the District Court and the Court of Appeals: whether Cioffi's speech was a matter

(Cont'd)

As the Second Circuit recognized, application of the principle enunciated in *Garcetti v. Ceballos* to the record in this case would not change the result. So, Averill Park's petition is not really seeking to have the Circuit re-apply *Garcetti* as it is to have the Circuit adopt a rule of law that this Court has previously rejected. Petitioner argues that, because Cioffi's letters were in part based on inside information which private citizens do not have, that is because he used information obtained in the course of his employment, his speech cannot be protected by the First Amendment. This argument was specifically rejected in *Garcetti.* This Court recognized the importance of having public employees contribute to the civic discourse by bringing information they obtain on their jobs to public light. "Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Garcetti*, 126 S. Ct. at 1958 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004) (*per curiam*)).

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(Cont'd)

of public concern or a private employment grievance as those concepts were defined in *Connick v. Myers*, 461 U.S. 138 (1983). Petitioner's frequent protestations against the Second Circuit's ruling on this issue (*e.g*, labeling Cioffi's speech as self-serving and personally motivated) are irrelevant here. As petitioner reluctantly concedes (Pet. 19, fn. 2), this is not the issue on which it has sought certiorari.

In the final analysis, no useful purpose would be served by vacating the judgment of the Second Circuit and remanding this case to that Court for further proceedings. The record of this case simply does not contain any foundation for concluding that the Second Circuit's decision undermines or conflicts with this Court's *Garcetti v. Ceballos* decision. Thus, there is no reason to waste valuable judicial resources and remand the case to the Second Circuit to restate a rule of law that has already been correctly stated.

## II. THIS CASE IS NOT IN A POSTURE WHERE PLENARY REVIEW OR REMAND WOULD ALLOW THIS COURT OR THE LOWER COURTS TO ARTICULATE AND DEVELOP A COMPREHENSIVE FRAMEWORK FOR APPLYING *GARCETTI v. CEBALLOS.*

As a general rule of law, an appellate court will not consider an issue not passed upon below, particularly at the stage when the record is fully developed. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Although the record is fully developed, now, for the first time, on a petition addressed to this Court, Averill Park is raising the argument that Cioffi's speech was made pursuant to his job duties. Averill Park, however, told the Second Circuit something very different. It explicitly told the Second Circuit that Cioffi was not fired because of his speech and that, unlike the public employer in *Garcetti v. Ceballos*, it had no legitimate interest in restraining his speech. "[Averill Park] ha[s] never contended that Cioffi's position was abolished because of his speech, or that its decision was justified because of any disruptiveness of his speech." Averill Park's Brief in the Second Circuit at p. 29 n.3. Nor did Averill Park ever request the Second Circuit to allow additional briefing on the issue that Cioffi's speech was part of his job duties.[4]

More importantly, Averill Park's position did not differ at all from that of the Second Circuit – it never saw this record as even raising the question whether Cioffi's speech was a mandatory part of his job duties. Averill Park, if it thought the facts supported it, could have defended the suit on the grounds that Cioffi's speech was uttered in his capacity as a public employee. Averill Park did not, even though other circuits, district courts, and even the very district court where this case arose had certainly utilized similar analysis prior to this Court's decision in *Garcetti v. Ceballos*.[5]

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[4] *Certiorari* was granted in *Garcetti v. Ceballos* on February 28, 2005. Cioffi's case was argued several months later on September 7, 2005, yet Averill Park never mentioned *Garcetti v. Ceballos* in its argument to the Second Circuit, nor did it write to the Circuit at any time concerning *Garcetti v. Ceballos*.

[5] *E.g.*, *DiMeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995) (*Connick* left unprotected employee speaking as an employee, rather than as a citizen); *Buazard v. Meridith*, 172 F.3d 546, 548-49 (8th Cir. 1999) ("Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment. . . ."); *Gillum v. City of Kerrville*, 3 F.3d 117, 120-21 (5th Cir.1993) ("[W]e d[o] not focus on the inherent 'importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. . . ."); *Thomson v. Scheid*, 977 F.2d 1017, 1020 (6th Cir. 1992) ("First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee."); *Schad v. Jones*, 415 F.3d 671, 676 (7th Cir. 2005); *Ethier v. City of Cohoes*, 2006 U.S. Dist. LEXIS 20647 *15 (N.D.N.Y. 2006) ("Speech that arises in the usual course of a public official's duties is generally not protected.") (citing *Cahill v. O'Donnell*, 75 F. Supp.2d 264, 273 (S.D.N.Y. 1999)).

Further, the Second Circuit only has denied Averill Park summary judgment and has remanded the case for trial. A trial will allow development and clarification of the issues, and if necessary an appeal. Because this case is at an interlocutory stage, and because Averill Park raises a factual defense (namely that Averill Park fired Cioffi for budget reasons and not speech reasons) that would, if accepted, eliminate the federal constitutional free speech question, there is no need for this Court to intervene now and render an advisory opinion on a constitutional question.

This is especially true when the question whether Cioffi spoke pursuant to his job duties is being raised for the first time in a petition to this Court. Averill Park has chosen a vehicle particularly ill-suited for Supreme Court review. There inevitably will be cases where the parties raise the *Garcetti v. Ceballos* issue, have extensive discovery, and then brief the issue to the court. This did not happen here, and therefore this case is inappropriate for developing a rule of law either upon full review or remand.

## CONCLUSION

The petition for a writ of certiorari should be denied because no useful purpose would be served by vacating the judgment of the Second Circuit and remanding this case to that Court for further proceedings.

Respectfully submitted,

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# APPENDIX

## APPENDIX — JOB DESCRIPTION OF THE DUTIES AND RESPONSIBILITIES OF THE DIRECTOR OF ATHLETICS AND PHYSICAL EDUCATION DATED SEPTEMBER 25, 1991 AND REVISED JUNE 1, 1999

### AVERILL PARK CENTRAL SCHOOL DISTRICT

### JOB DESCRIPTION OF THE DUTIES AND RESPONSIBILITIES OF THE DIRECTOR OF ATHLETICS AND PHYSICAL EDUCATION

JOB GOAL: To provide substantial and effective leadership in developing, achieving, and maintaining the interscholastic athletic and district physical education programs.

### GENERAL ADMINISTRATION AND COORDINATION OF PROGRAM

1. Comply with New York State policies and the regulations associated with New York State Public High School Athletic Association, and with School Board Policy relating to athletics.

2. Promote good sportsmanship as a priority of the athletic program.

3. Recommend policies for control of athletic contests, provide a program for educating spectators, and coordinate chaperones and other supervision.

4. Schedule athletic contests and make arrangements for officials, field crews, transportation, supervision (crowd

control), and medical services for the interscholastic athletic program.

5. Meet with the high school and middle school principals on a regular basis to discuss the athletic and intramural programs.

6. Represent the school district at conferences, meetings, and athletic councils at the local, regional, state, or national level, subject to approval of the principal and superintendent of schools.

7. Plan policies and procedures for emergency care, such as victims of accident, injury or sudden illness.

8. Supervise interscholastic awards.

9 Organize and direct tournaments.

10. Prepare written reports for administrators within the district and the State Education Department regarding athletics and physical education.

11. Perform various assignments as required by the high school or middle school principals.

FACILITIES

12. Study needs and make recommendations to the elementary school, middle school or high school principal for construction, modification, and/or

alteration of indoor and outdoor facilities related to athletics and physical education.

13. Arrange and/or conduct periodic inspection of facilities and equipment and recommend necessary maintenance and repairs, particularly related to students' health and safety, to the Head Custodian or grounds supervisor.

14. Schedule, assign and regulate the equitable use of indoor and outdoor facilities for educational and recreational purposes by school groups.

15. Work with the grounds supervisor on preparing and maintenance of all practice and game fields.

## EQUIPMENT AND SUPPLIES

16. Insure that all student participants have the equipment required to practice and compete safely.

17. Organize and supervise the management of instructional and athletic equipment, materials, and supplies (includes the selection, purchase, identification, storage, inventory, maintenance, and equitable distribution of supplies) for interscholastic and modified athletic teams.

18. Prepare long term plans for purchase of equipment and supplies.

19. Devise procedures for providing, controlling, and maintaining athletic uniforms.

*Appendix*

BUSINESS MANAGEMENT

20. Supervise the collection, custody, and deposit of money collected as ticket, sales, gate receipts, and special projects.

21. Develop a budget including provisions for new and replacement equipment, supplies, maintenance, and personnel services.

22. Provide for the allocation of funds in accordance with budgetary appropriations, accounting and reporting procedures.

23. Initiate, approve, or authorize all athletic requisitions, examine and approve bills for payment for equipment, supplies, materials, and services and consult with the Principals on the purchase of physical education equipment.

SUPERVISION AND TRAINING

24. Coordinate with nurses and building principals for the scheduling of medical examinations for candidates of athletic teams and establish follow-up procedures to secure correction of defects.

25. Assist with records of all athletes checked to determine provision for insurance coverage and required physical examinations, and eligibility for athletic competition.

26. Organize and/or advise student groups related to athletics.

27. Recruit and recommend coaches and intramural staff for appointment, subject to the agreement of the building principal. Assist the building Principals in reaching closure on the final selection of regular classroom teachers as their appointment relates to a vacant intramural or coaching position and assists all Principals on the appointment of physical education staff.

28. Assure that coaches meet New York State coaching certification requirements.

29. Help prepare and coordinate schedules of coaches for all phases of the athletic program.

30. Observe and evaluate the effectiveness of coaches in all phases of coaching, and maintain records of all ratings in evaluations.

31. Disseminate information and stimulate interest pertaining to seminars, workshops, extensions courses, conferences, clinics, and research at the local, state district, and national level.

PUBLIC RELATIONS

32. Act as liaison or moderator to any Booster Club or parent support group and recommends and supervises the faculty advisor to the Varsity Club.

33. Develop and supervise a system of news releases to area media relating to schedules and the achievements of teams, players, and coaches.

34. Develop, maintain, and coordinate effective relationships and high morale relating to the athletic program, among teachers, students, coaches, parents, and community and state organizations.

JOB QUALIFICATIONS: Those required to supervise the district-wide interscholastic education and physical education program and its related activities. A School Administrator Supervisor (SAS) certificate is required.

REPORTS TO: Middle school principal for those intramural and athletic activities associated with students in grades 6-8.

High school principal for those intramural and athletic activities associated with students in grades 9-12

Assistant Superintendent for those physical education activities associated with students in grades K-12.

Superintendent for all final recommendations associated with annual budget, new athletic program initiatives, facility needs and periodic discussions related to staffing.

9/25/91
Revised; 6/1/99

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FILED

SEP 11 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1

IN THE

# Supreme Court of the United States

AVERILL PARK CENTRAL SCHOOL DISTRICT,
AVERILL PARK CENTRAL SCHOOL DISTRICT BOARD
OF EDUCATION, and AVERILL PARK HIGH SCHOOL,

*Petitioners,*

*v.*

LOUIS J. CIOFFI, III,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

# REPLY BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

## TABLE OF CONTENTS

Page

Corporate Disclosure Statement ................ i

Table of Contents ............................ ii

Table of Cited Authorities ..................... iii

Reply to Counterstatement of Facts ............. 1

Reasons for Granting the Petition .............. 3

I. Remand Will Conserve Judicial Resources And Permit The Second Circuit To Develop A Comprehensive Analytical Framework For Applying *Garcetti*. .................... 3

II. Respondent's Arguments In Opposition To The Petition Are Meritless. ................ 7

Conclusion ............................... 10

Appendix — Letter Dated November 7, 2001 ..... 1a

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) ..... *passim*

*Lawrence v. Chater*, 516 U.S. 163 (1996) ........ 3, 4

*Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) .............................. 9

*Meacham v. Knolls Atomic Power Labs*, __ F.3d __, 2006 WL 2338174 (2d Cir., Aug. 14, 2006) .... 6

*Mount Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274 (1977) ................ 7, 8

*Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563 (1968) ................. 7, 8

*Stutson v. United States/Lawrence v. Chater*, 516 U.S. 163 (1996) (Scalia, J., dissenting) ........... 4

**Constitutional Provisions:**

U.S. Const. amend. I ......................... *passim*

Averill Park respectfully requests that this Court grant certiorari for the limited purpose of vacating the decision of the United States Court of Appeals for the Second Circuit, and remanding for reconsideration in light of this Court's subsequent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006). For the additional reasons set forth below, the petition for certiorari should be granted.

## REPLY TO COUNTERSTATEMENT OF FACTS

For purposes of Averill Park's petition for certiorari, the facts of this case are germane only to the question of whether, on remand, the Second Circuit reasonably might conclude that Cioffi's November 7, 2001 letter and his subsequent press conference were undertaken pursuant to Cioffi's official duties as Athletic Director, and thus do not constitute protected speech following *Garcetti*. Cioffi's brief in opposition includes a lurid, inaccurate, and ultimately irrelevant account of an allegedly "out-of-control" football team and an alleged "cover up" of an alleged "sexual assault." Cioffi, however, does not and cannot dispute Averill Park's recitation of the pertinent record evidence which, if reconsidered by the Second Circuit in light of *Garcetti*, would support a conclusion that Cioffi's speech is not protected under the First Amendment.

Averill Park is not complaining about "erroneous factual findings" by the Second Circuit. (Brief in Opposition, pp. 1, 9-10.) To the contrary, Averill Park's petition rests on the undisputed factual findings of the courts below. (Petition, pp. 3-4, 15-17.) Such facts were recited by the Second Circuit in the light most favorable to Cioffi, for purposes of Defendants' summary judgment motion. (App. A at 6a.)

The Second Circuit found that Cioffi was responsible for the supervision of Coach Earl and the football team, and that he was part of a team of school district administrators who responded to the hazing incident. (App. A at 3a, 17a; Petition, p. 15.) The Second Circuit concluded that ensuring the health and safety of student athletes was at the core of Cioffi's job responsibilities as Athletic Director, and that his November 7, 2001 letter was prepared in furtherance of those responsibilities, even if the letter was also submitted for a self-serving purpose. (App. A at 4a-5a, 15a-16a; Petition, pp. 15-17.) In its petition, Averill Park has not disagreed with these key factual findings.

Cioffi's effort to distance his November 7, 2001 letter from the ambit of his official duties rests solely on his false contention that his letter was addressed to the Board of Education, to whom he had no direct reporting relationship. (Brief in Opposition, p. 8.) As evident from the face of that letter, and as the Second Circuit noted, Cioffi's November 7, 2001 letter was addressed to Dr. Johnson, to whom Cioffi did report. (App. A at 4a; App. at 1a.) At Cioffi's request, Dr. Johnson also shared that letter with the Board. (App. A at 4a; App. B at 26a.) Cioffi does not dispute his deposition testimony that in addressing the hazing incident and its aftermath in his November 7, 2001 letter, he was "doing [his] job" because "health and safety, liability, professional misjudgment are all things that an Athletic Director must bring to his superiors." (R. 350; Petition, p. 15.)

As the courts below found, Cioffi's *modus operandi* as Athletic Director was to regularly complain to both the Superintendent and the Board of Education about Coach Earl and the allegedly "out-of-control" football program. (App. A at 3a; App. B at 24a-25a.) Consistent with this finding, Cioffi's complaint alleges that:

> ¶ 21 Plaintiff in his capacity as Athletic Director warned High School and School District

> officials as to the improper activities, policies and practices of the football program .. .
>
> ¶ 28 In attempting to alert District officials to these activities, policies and practices, Plaintiff was acting in his official capacity as Athletic Director with a concern for the health and safety of the students . . .

(R. 35-36.) The question presented is whether the Second Circuit should reconsider these uncontested record facts, with the benefit of this Court's instruction in *Garcetti*, to determine anew whether Cioffi's speech may be sheltered under the mantle of the First Amendment.

## REASONS FOR GRANTING THE PETITION

### I. REMAND WILL CONSERVE JUDICIAL RESOURCES AND PERMIT THE SECOND CIRCUIT TO DEVELOP A COMPREHENSIVE ANALYTICAL FRAMEWORK FOR APPLYING *GARCETTI*.

Both the *per curiam* and dissenting opinions in *Lawrence v. Chater*, 516 U.S. 163 (1996), upon which Cioffi relies, (Brief in Opposition, pp. 2, 6, 8) demonstrate that the Second Circuit should be directed to consider the effect of this Court's holding in *Garcetti* upon Cioffi's free speech claim. In *Lawrence*, this Court explained at length the circumstances which warrant granting certiorari for the limited purpose of vacating the judgment below, and remanding so that the Court of Appeals may reconsider a case in light of intervening developments. All of the Justices of this Court agreed that issuing such an order is most appropriate when a controlling decision of this Court is rendered after the Court of Appeals' decision, which casts doubt on the resolution of a federal question. 516 U.S. at 167 (per curiam); *Stutson v. United States/Lawrence v. Chater*, 516 U.S. 163, 180-81 (1996) (Scalia, J., dissenting). In such circumstances, this Court instructs "the lower courts to apply the new rule retroactively to cases not yet final." *Lawrence*, 516 U.S. at 167. Doing so:

> conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

*Id.*

Because such a limited order by this Court does not rest upon a finding of error by the lower court, and requires only further consideration, this Court applies a "more liberal" standard than is applicable for granting plenary review. A finding of "probable reversal" is not required in these circumstances. Rather, this Court need only find "a reasonable probability that the decision below rests on a premise that the lower court would reject if given the opportunity for further consideration," and that such reconsideration "may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167. This Court also considers the "equities" in a particular case, including whether the delay and cost entailed by a remand are justified by the potential benefits of further consideration by the lower court. *Id.* at 168.

These considerations demonstrate that remand is warranted to give the Second Circuit an opportunity to reconsider the threshold question of whether Cioffi's speech is protected under the First Amendment, in light of this Court's decision in *Garcetti*. When the Second Circuit issued its decision, it did not have the benefit of this Court's teaching in *Garcetti*, which adds to the protected speech analysis a new, threshold inquiry as to whether a public employee's speech was part of his or her official duties. If the answer to that separate and distinct question is "yes," then the First Amendment claim must fail, without regard to whether the speech touches on a matter of public concern.[1] The Second Circuit improperly collapsed these two inquiries, when it anticipated that Cioffi's speech could be considered that of a "citizen/employee," even though such speech was within the ambit of his job duties, simply because it touched on matters of public concern.[2] (App. A at 16a, n.3.)

Averill Park trusts that the Second Circuit would be mindful of its duty to faithfully apply this Court's holding in *Garcetti* upon remand. Notably, the Second Circuit recently issued a decision, following remand by this Court, that was diametrically opposed to its earlier decision, in *Meacham v. Knolls Atomic Power Labs*, __ F.3d __, 2006 WL 2338174 (2d Cir., Aug. 14, 2006). As discussed in the petition, this Court remanded *Meacham* to the Second Circuit, to permit reconsideration of whether a jury verdict in favor of plaintiffs could stand, following an intervening decision by this Court which made it more difficult for plaintiffs to prevail on "disparate impact" claims of age discrimination. (Petition, pp. 20-21.) Following remand, the Second Circuit invalidated the jury verdict which it had previously upheld, on the grounds that its prior rejection of the employer's defense was "untenable" in light of this Court's subsequent teaching that a "business necessity" test was inapplicable to the defense of plaintiffs' claims. *Meacham*, 2006 WL 2338174 at *3.

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[1] There can be little doubt that Mr. Ceballos' "disposition memorandum" touched on matters of public concern, including alleged police misconduct. *Garcetti*, 126 S. Ct. at 1955-56. This Court, however, never reached that issue in *Garcetti*, based on its conclusion that the "disposition memorandum" was prepared within the scope of Mr. Ceballos' official duties, and was thus unprotected. *Id.* at 1960-61.

[2] For this reason, Averill Park's petition for certiorari is not based upon a claim that the Second Circuit "misapplied a properly stated rule of law." (Brief in Opposition, p. 1.) Without waiting for this Court to enunciate the new, properly stated rule of law applicable to a public employee free speech case such as this one, the Second Circuit incorrectly assumed what the effect of this Court's then-forthcoming decision in *Garcetti* might be. (App. A at 16a, n.3.)

Similarly, the Second Circuit now has the benefit of this Court's explicit instruction in *Garcetti*, which requires the court to make a threshold determination that the plaintiff-employee was not speaking within the scope of his or her official duties, before passing on the next and entirely separate line of inquiry as to whether the employee's speech touched upon a matter of public concern. On the undisputed record evidence in this case, there is at least a "reasonable probability" that the Second Circuit would reverse its holding that Cioffi's speech is protected under the First Amendment. The equities also favor remand in this case, because a threshold determination that Cioffi's speech is not protected, following *Garcetti*, would obviate the need for a time-consuming and expensive jury trial, and possible post-trial appeals. Remand will also afford the Second Circuit an opportunity to develop a comprehensive analytical framework for the proper application of this Court's decision in *Garcetti*.

## II. RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION ARE MERITLESS.

In opposition to the petition, Cioffi contends that the "posture of this case" does not favor remand. Specifically, Cioffi argues that: 1) *Garcetti* is inapplicable to his First Amendment claim because a "*Pickering* balancing test" is inapplicable to this case; 2) a jury trial should *precede* reconsideration of whether Cioffi has a triable First Amendment claim; and 3) Averill Park has waived its right to benefit from the retroactive application of *Garcetti* to the facts of this case. None of these arguments support denial of the petition.

With respect to the causation element of Cioffi's retaliation claim, Averill Park is defending on the grounds that it abolished the Athletic Director position for legitimate economic reasons, and that it would have done so even in the absence of any anger over Cioffi's speech. (App. A at 20a.) Averill Park's defense comports with this Court's seminal "dual motives" analysis in *Mount Healthy City School Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 283-87 (1977). Because Cioffi was not terminated for cause, at the summary judgment stage, a "*Pickering* balancing test" was not required to determine whether any disruption occasioned by Cioffi's speech justified his termination. *Pickering v. Board of Educ., Township High School Dist.*, 391 U.S. 563, 570-71 (1968). On this basis, Cioffi incorrectly leaps to an assertion that Averill Park has "admitted" that it had no legitimate interest in controlling his employment-related speech, and that *Garcetti* is thus inapplicable. (Brief in Opposition, pp. 2, 5, 11.)

This Court's decision in *Garcetti* is not dependent upon a *Pickering* balancing test. Both the *Pickering* balancing test and the *Mount Healthy* "dual motives" analysis require a predicate finding that plaintiff's speech is protected under the First Amendment before the causation element is addressed. *Pickering,* 391 U.S. at 572-73; *Mount Healthy,* 429 U.S. at 284. If the answer to that threshold question is "no," the case is at an end. *Garcetti,* 126 S. Ct. at 1951.

Indeed, a *Pickering* balancing test would not necessarily have been required in *Garcetti,* even if plaintiff's speech had been deemed protected. Like Averill Park, the defendant-employer in *Garcetti* did not contend that plaintiff's speech was unduly disruptive, and thus justified the adverse employment actions against him. Like Averill Park, the defendant-employer in *Garcetti* instead contended that the adverse employment actions against plaintiff were justified by legitimate, non-retaliatory reasons, notwithstanding their "heated" reaction to plaintiff's "disposition memo." 126 S. Ct. at 1956.

As this Court concluded in *Garcetti,* a public employer's interest in controlling the content of an employee's work product, which it pays for, extends well beyond preventing "disruptive" speech. When an employee speaks or writes in his or her professional capacity, the employer may act to ensure that the communications "are accurate, demonstrate sound judgment, and promote the employer's mission." 126 S. Ct. at 1960. "Inflammatory or misguided" official communications may subject a public employee to adverse action, with no constitutional consequences. *Id.* at 1960-61. The application of *Garcetti* is thus not limited to cases involving "disruptive" work-related speech.

In sum, if Cioffi's speech is not protected following *Garcetti,* there is no need to reach the causation element of Cioffi's claim, under either *Pickering* or *Mount Healthy.* This threshold question thus should be reconsidered by the Second Circuit, on the record evidence adduced at the summary judgment stage, in light of *Garcetti.*

Cioffi asserts that remand is unnecessary because if a jury agrees with Averill Park's defense on the causation element of his retaliation claim, the question of whether his speech is protected may become moot. (Brief in Opposition, pp. 3, 13.) Cioffi's argument attempts to put the proverbial cart before the horse, by requiring Averill Park to defend a jury trial on causation, before any threshold determination is made as to whether his speech is protected following *Garcetti*. Such a procedural course would unnecessarily deplete judicial resources, and would likely result in further post-trial appeals.

Finally, Cioffi contends that remand is unwarranted because Averill Park did not specifically argue the *Garcetti* analysis in the courts below, before this Court rendered its decision. (Brief in Opposition, pp. 11-13.) Cioffi's argument is unavailing, because Averill Park has at all times throughout this litigation argued that Cioffi's speech is not protected. (App. A at 5a-6a; App. B at 28a-29a.) Nothing more is required to permit the retroactive application of this Court's decision in *Garcetti* to Cioffi's pending case.

This Court has ruled that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). The federal question in *Lebron* was whether Amtrak was subject to the First Amendment as a government actor. In the courts below, plaintiff argued that Amtrak was a private entity, but was so closely connected to federal entities as to be subject to the First Amendment. After this Court granted certiorari, plaintiff presented for the first time an alternative argument that Amtrak was itself a federal entity. *Id*. This Court concluded that plaintiff's new argument was cognizable, because it was not a new claim, but rather an alternative theory to support plaintiff's consistent position that Amtrak was subject to the First Amendment. *Id.*

Similarly, in this case, Averill Park is not raising a new claim or defense. Averill Park has instead presented, in its petition for certiorari, an alternative argument to support its steadfast position that Cioffi's speech is not protected under the First Amendment. Averill Park has never waived or abandoned this defense. Accordingly, the Second Circuit should be directed to retroactively apply *Garcetti,* at the summary judgment stage.

## CONCLUSION

For all of the foregoing reasons, the petition for certiorari shold be granted, at least to the limited extent of vacating the decision and judgment of the Second Circuit, and remanding to the Second Circuit for further consideration in light of *Garcetti.*

Respectfully submitted,

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# APPENDIX

## APPENDIX — LETTER DATED NOVEMBER 7, 2001

November 7, 2001

Dr. Michael Johnson, Superintendent of Schools
Averill Park Central School District Office
8439 Miller Hill Road
Station 1
Averill Park, NY 12018

Dear Dr. Johnson:

After the administrators' meeting on October 29, 2001, Nancy & I were requested to remain after everyone had left in order to speak with Jo Moccia and you concerning the hazing issue. In the course of the discussion, Jo made an innocent comment about 'the leadership' perhaps somehow sharing responsibility for the incident, and how this incident could possibly be allowed to have happened. She was, appropriate to her role, asking an obvious and important question. The immediate response by Nancy was to denounce the suggested 'lack of leadership' as an excuse for the misconduct. She went on to explain that, indeed, Kevin has not experienced having administrative oversight by either her or me, since we were both directed to limit our dealings with him. Further, we were directed to inform you about any/all incidents that we found to be troubling, and that you would deal with Kevin directly, or, give us directives as to what to do. It bothers me that Jo was, seemingly, unaware that we were given this directive, and that Kevin was 'allowed' to run by a different set of rules from other faculty members and coaches. Whenever we were faced with a question about what to do about 'misconduct' on Kevin's part, we only acted after consulting with and being directed by you. I followed your directives to the letter.

In that same meeting with Jo, you did affirm that this was the case. You stated that Jo was not 'up to speed' on all of the facets of the 'Kevin issue'.

## *Appendix*

My concern is that some board of education members may not be 'up to speed' on all of the facets of the 'Kevin issue' as they relate to the leadership question. I believe I have been nothing but conscientious about alerting you when I had concerns. Should you review your files, you will find numerous memos concerning Kevin. I have been diligent in following your directives in dealing with Kevin, even if we disagreed with the direction being taken.

Attached, for example, is the letter sent by me outlining several instances of Kevin's not following procedure, or of his failure to recognize boundaries. Since that time, as you know, Michael, I received a copy of a handout that was given to all football players by Kevin, in which he demands silence from all team members, as well as outlining procedures that are in opposition to the blue card (a copy is also attached). This collection of troubling instances worries me, since board members may be aware of some or all of them, and believe (wrongly) that Nancy and I knew of them, and did nothing about them, when, indeed, they were duly reported each and every time. This, unfortunately, is but a small fraction of instances that I have documented and discussed over the past five plus years, relating to Kevin Earl.

I realize that the board of education membership has changed over the past several years. It would probably be impossible for new board members to be 'up to speed' on each and every issue. However, in light of the very serious nature of recent events involving the hazing issue, I feel compelled to set the record straight about the 'leadership' question.

My overriding concern has been for the health and safety of our students, as well as for the school district potentially being held liable for professional misjudgment. It is for these reasons that I continue to report instances of concern regarding Kevin's behavior, or that of any coach or teacher, for that matter. I wish to assure you that I have taken my duty to do so quite seriously.

In our discussion on November 6 between Nancy, me, Jo and you, we were informed that the definition you were provided by outside sources of the word 'victim' leads you to conclude that we do not have a victim in the hazing situation. While I have a problem accepting that explanation about why perpetrators have not actively been sought out, I have and continue to support the direction you and the board have decided to take. My concern is that others may have been victimized as well (for example: some of the boys who watched the hazing take place and felt powerless to stop it; others who have been too scared to come forward; others who are presently in seventh or eighth grades and have heard about it happening to ninth graders and who fear it). The needs of these individuals may not have been served by the investigation that took place. Again, that said, I continue to wholly support the direction decided upon by you and the board of education in this matter. I have assisted in facilitating the training session to be presented to all of our students on December 11 and 12. Also, a very positive meeting was conducted on November 6, at which I invited Mr. Ernest Steck to speak with coaches on the topic of professional responsibility.

As always, I thank you for your continued willingness to listen to concerns, and for your attention to these serious issues.

Sincerely,

s/ Lou Cioffi
Lou Cioffi